[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1909.

No. 552

OBERLIN M. CARTER, et al.,
Cross-Appellants,
vs.
UNITED STATES OF AMERICA,
Cross-Appellee.

BILL OF COMPLAINT, FINDINGS OF THE COURTS AND REFERENCES TO THE EVIDENCE.

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ABBREVIATIONS.

A. R.—Altamaha River.
An. R. C. E.—Annual Report of the Chief of Engineers.
Art. War.—Articles of War.
B. E.—Board of Engineers Record.
B. H.—Brunswick Harbor.
Bix.—Printed testimony of Col. W. H. Bixby.
C. M.—Court Martial Record.
C. S.—Cumberland Sound.
Def. Ex.—Defendant's Exhibit.
D. H.—Darien Harbor.
Div.—Division.
Ex.—Complainant's Exhibit.
G. O.—General Orders, Headquarters of the Army.
Hew.—Hewlett Record, Volumes I and II.
J. C.—Jekyl Creek.
McP.—Printed testimony of Charles McPherson.
Man. Ct. Mar.—Manual for Courts Martial.
N.—Printed testimony of Robert Nelson.
N. Y.—New York Record; Removal Proceedings
Par.—Parsons Record.
Rec.—Official Record.
Ref.—Defendant's References to the Evidence.
Rep.—Report.
R. M.—Romerly Marsh.
S. H.—Savannah Harbor.
S. R.—Savannah River.
Wit.—The Witnesses and their testimony.
Wy.—Wyman Record.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1909.

No. 552

OBERLIN M. CARTER, et al.,
Cross-Appellants,

vs.

UNITED STATES OF AMERICA,
Cross-Appellee.

BILL OF COMPLAINT

AND

FINDINGS OF THE COURTS.

GENERAL ALLEGATIONS.

I.

The bill alleges in general terms Carter's "duties, powers and discretions."

II.

The bill alleges in general terms that in 1891 a scheme was "devised to defraud" the United States.

III.

The bill alleges in general terms that the scheme devised to defraud the United States was "put in operation" on or about "the first day of January, 1891."

IV.

The bill sets forth in general terms an alleged description "of the engineering work" in issue.

DETAILED ALLEGATIONS.

V.

The bill states in this paragraph what it terms "*Details of the fraud introduced into and under the contracts,*" and in subsequent paragraphs states details of other matters alleged against the defendants. These will now be stated, and the findings of the courts thereon will be given, together with references to the evidence which supports those findings.

CONSPIRACY.

The bill of complaint alleges "that on or about the year 1891," Oberlin M. Carter conspired with certain contractors, known generally as Greene & Gaynor, to defraud the United States; that this "fraudulent scheme" or "conspiracy" contemplated that "by undue shortness of time in advertising," by "withholding specifications from proposed bidders not in the conspiracy," by drafting specifications "so as to mislead proposed bidders not in the conspiracy," by "secretly furnishing to his co-conspirators information as to the bids and as to his future conduct as engineer officer in charge in the construction of the work under the contract," the said Carter would "effectually suppress competition in the bidding," and that thus the "contracts would be fraudulently let for the benefit of said conspirators at high and exorbitant cost."

The bill further alleges that the "conspiracy" contemplated that Carter would call for "two or more designs or mattresses specified at one price," and that the alleged conspirators would be informed by Carter "before the bidding that only the cheapest design of those specified in the specifications would be called for," so that said alleged conspirators could bid a "very high price" and still "underbid all other bidders and obtain the contract."

The bill further alleges that the "conspiracy" contemplated that Carter would prepare improper specifications so that thereunder he could accept "material of very poor and cheap quality" from the alleged conspirators, and could reject sim-

ilar material if some other bidder got the contract; that Carter would so arrange "that there would be little if any inspection" of the work done by the alleged conspirators; that Carter would pay his alleged co-conspirators "for such inferior material and work to be put into said works as aforesaid and at the exorbitant and fraudulent prices stated in such contracts"; that Carter and his alleged co-conspirators "should aid each other in the concealment" of these alleged crimes; and that they would finally divide between themselves "the net profits" of such contracts.

The bill then alleges that said Carter "did on or about the first day of January, 1891, commence to put said fraudulent scheme in operation"; that he performed all the acts hereinbefore set forth as constituting or proving said conspiracy; that he further improperly permitted the contractors to sink brush mattresses several at once, or in multiple, which it is alleged "was very much cheaper for the contractor to put in than the cost of putting in the single mats"; and that "the said conspirators have continued to aid and abet each other to this day."

Oberlin M. Carter made answer to the allegations of the bill of complaint, stating under oath that "this defendant denies as a whole, and denies in every part, both generally and in detail, that he ever conspired to do, or attempted to conspire to do, or that he ever did or attempted to do, or discussed doing or ever thought of doing, either alone or in connection with others, or ever aided or advised or permitted others to do or attempt to do, or ever knew of others doing or attempting to do, or discuss or conspire doing or attempting to do all or any of the acts or things, or any part thereof" which are described in the bill of complaint as hereinbefore set forth; and Carter further made specific denial under oath of the various specific charges alleged against him.

On this issue, the burden of proof was on the complainant to prove the conspiracy alleged. The Circuit Court, as will be shown later herein, held specifically against the complainant on every alleged fact set forth in the bill as constituting or making out the conspiracy charged, holding that there was no undue shortness of time in advertising, no withholding of specifications from proposed bidders, no improper drafting of specifications, no secret information to the alleged conspirators, no improper material used or improper inspection of the work, that it was right to call for three designs of mattresses at one price, because all three designs

cost the same, that it was right to sink mattresses in multiple, because it did not aid the contractor, but did aid the United States,—in short, that every charge made against Carter in the bill as the basis of the alleged conspiracy was false.

The Circuit Court hence refused to hold that any conspiracy ever existed at all, which, under well-settled rules of law, is a finding against the complainant.

Furthermore, there could not have been a conspiracy by Carter without knowledge thereof by him, and the Circuit Court refused to hold that Carter ever had any actual knowledge of the so-called raid made by the contractors in making profits under their contracts. That court says "without passing directly upon the questions as to whether Carter had actual knowledge of and connived at this raid upon the government, the facts brought out concerning these financial transactions are such that he must, as a conclusion of law, be held chargeable with knowledge of what was being done in the premises." (Rec., 382.)

The Circuit Court not only refused to hold that Carter had any knowledge of the transactions referred to, but stated strong facts showing affirmatively that Carter had no such knowledge. In referring to the $3,000,000 of contracts let to Greene & Gaynor in 1896, the court says that Carter sought and obtained a transfer to London. This was before Carter had ever paid out a dollar on those contracts. The court assumed that if Carter had been interested in the contracts prior to 1896, he would not voluntarily have asked for a transfer from Savannah to London, but would have stayed to get his share of the profits. The Circuit Court held concerning this matter as follows:

> "There are some *ad hominem* considerations which may serve as makeweights in arriving at a just estimate of Carter's conduct. He withdrew from the charge of the work for the purpose of accepting a position of honor as Military Attache at the court of St. James and Army Engineer of the Nicaragua Canal Commission. There is nothing to indicate that he was forced to do so. Is it likely that he would have left matters in such shape as to put himself and his honor into the hands of his successor? And again, if he were conniving at personal profit, would he have naturally retired from the service in the face of the opportunity just at hand to reap large additional profits from the Cumberland Sound contract?" (Rec., 379.)

The Circuit Court of Appeals affirmed all the findings of fact of the Circuit Court, setting forth in detail many of those findings, and concluded as follows:

> "We concur, therefore, in the opinion filed by the trial judge, that the charge of conspiracy between Captain Carter and the contractors to defraud the United States, under the contracts referred to, is: (a) neither established by direct evidence, (b) nor can such charge be upheld under the testimony alone of methods adopted in making specifications, advertising for bids, treatment of proposed bidders, or letting contracts, (c) nor under one or the other several branches of testimony reviewed in the opinion, considered independently of the entire chain of circumstances." (Rec., 13425.)

The "chain of circumstances" which the Circuit Court of Appeals then says upsets all those findings made in Carter's favor, is as follows:

(a) The suspicion that when Carter had used 350,000 square yards of brush mattresses under the contract of 1892, he "must have discovered" that Greene & Gaynor were making excessive profits and that Robert F. Westcott was receiving one-third thereof.

(b) The fact that four years thereafter, *i. e.*, in October, 1897, Westcott gave the investment of considerable of the proceeds thereof to Carter.

(c) The fact that Carter paid the contract price for work done under the contract of 1892 after October, 1893.

(d) The letting of further contracts to Greene & Gaynor at similar prices after October, 1893, and the receipt of the securities from Westcott in October, 1897.

In order to determine the exact ground upon which the Circuit Court of Appeals bases its opinion, it is proper to consider the following:

As to (a), the question of whether or not Carter discovered in October, 1893, that Greene & Gaynor were making excessive profits under the big contract is immaterial, as that court holds the contract was honestly let and fully performed, hence the profit or loss thereunder is a matter in which the government had no concern, whether Carter learned of said profits or not.

As to (b), the fact that four years later Westcott gave the investments of some of profits to his son-in-law, Carter, is immaterial, as the contract was honestly let and performed, and Westcott had a lawful right to be a partner with Greene

& Gaynor, and might give his share of the profits to whomsoever he pleased.

As to (c), Carter could not repudiate the big contract simply because the contractors were making excessive profits in performing it, but he was bound to pay the contract prices until the contract was completed.

As to (d), *i. e.*, the letting of further contracts after October, 1893, the opinion of the Circuit Court of Appeals as to "conspiracy" is in effect based on that alleged "fact alone." It will be seen hereinafter that the court erred in its view of the contracts let after October, 1893.

Further with respect to (a): There is no pretence of any direct evidence that Carter ever knew the contractors were making abnormal profits, and the only circumstantial evidence given by the Court of Appeals as indicating that he "must have discovered" the existence of such profits is simply that Carter was "an engineer of great experience and ability in harbor improvements." (Rec., 13426.) With regard to Carter's knowledge of "divisions" of the contractors' profits with Westcott, the Court of Appeals held specifically that "it does not appear, however, that Carter took part in or was present at any of the divisions referred to between the contractors and Westcott, nor is there any direct evidence that he was informed thereof, or was mentioned or intended in such transactions to be the beneficiary." (Rec., 13425.)

Further with respect to (b): The Circuit Court held that Westcott was a partner with Greene & Gaynor on his own behalf (Rec., 387), and refused to hold that Carter ever knew of such partnership, stating strong facts which show that he never knew of it. (Rec., 379.) In fact, the Circuit Court held:

> "For Carter, it is asserted as above stated, that if Westcott had any interests in the several contracts in suit, Carter was never advised thereof, and never suspected it; that Westcott held him in tender regard as the surviving husband of his deceased daughter, and lavished upon him large sums of money from his great wealth, and promised to make him his heir in place of his deceased daughter, Carter's late wife; and that, admitting the receipt by Westcott of large sums of money from Greene & Gaynor, a considerable part of the property in suit was not purchased with moneys derived from that source, or with any moneys which arose from any government contract; that when the securities were turned over to him by Westcott, he supposed Westcott was carrying out his promise to make him his beneficiary. There is

no legal presumption here that Carter knew what was going on and had been a party to it." (Rec., 381.)

The Circuit Court of Appeals says it does not pass on this question at all, as the facts "may not be clear under the testimony" (Rec., 13427), and holds that "the actual relation of Westcott" makes no difference in this case. (Rec., 13427.)

The uncontradicted evidence shows that Carter received the securities in question from Westcott openly and above board in the law office of Elihu Root, in the presence of Mr. Root's partner, who was Westcott's attorney, and of his own attorney, supposing he was receiving his deceased wife's share of her father's estate; and the fact of Carter's being on trial at that very time, and of nevertheless publicly signing written receipts for those securities, conclusively negatives the idea that he had any knowledge that the securities he was receiving had been purchased with money coming from Greene & Gaynor. For details, see *post*, p. 315, *et seq.*

Further with respect to (c): The contract of 1892 was *not* for a specific amount of brush mattresses, but that contract expressly states that it is for all "such materials and work as may be necessary to complete the present project of improvement of the harbor at Savannah." (Rec., 10154.) The specifications to the contract give these "materials and work" as follows: "Mattress work," "fascines," "pile work," "fender piles," "tie piles," sawn timber," "iron," "riprap stone," "large stone," "wharfing," and "material to be dredged" (Rec., 10163); and the contract gave the engineer in charge power to call for such amounts of any of those materials as he found necessary as the work progressed, irrespective of the original estimates of how much of each material might be required. (Rec., 10163, 10162.) It took about three years to complete the project, and after the work had been going on for about a year, *i. e.*, about October, 1893 (Rec., Vol. 29, Ex. 150), Carter found that it would take more mattresses, and less dredging, stone, etc., than originally estimated, to produce the best results, so in order to complete the work covered by the contract economically, he called for more mattresses from time to time, resulting altogether in the use of about $1,000,000 more brush mattresses than he originally estimated would be required, and the omission of about $1,000,000 of other material and work. (Rec., 13423.) Concerning this, the Circuit Court of Appeals, affirming the finding of the Circuit Court, says that Carter "was thus able to keep within the estimate of the cost of the whole and within the appropria-

tion, while, at the same time, he accomplished the results sought for." (Rec., 13411-12.) The uncontradicted evidence is that by such change the government saved more than $1,000,000 in mattresses and stone that would have been required if brush mattresses had been sunk singly each with a load of stone, thus sinking them deeper in the mud, etc., (Ref. No. 11), (Rec., 8054-55).

The Circuit Court of Appeals held that "the discretion of the engineer officer in charge [Carter] was rightly exercised in greatly extending the mattress work, instead of carrying out the plan of widening the channel by dredging (as let to another contractor) and of stone work (embraced in the Greene & Gaynor contract)" (Rec., 13426); and that court also held that its opinion "is not to be understood as intimating doubt, either of authority to make such changes in the interest of the government, nor that such substitutions were not effective for a great work in the improvement of harbors." (Rec., 13423.) So that it appears Carter was right in using nearly $1.000,000 of brush mattress work under the contract of 1892 after October, 1893, and the court has so held. Furthermore, that court held that the "terms contracted for were fairly obtained" (Rec., 13426), and that Carter believed them "to be reasonable when made" (Rec., 13426), *i. e.*, that the contract of 1892 was honestly let at a proper price; and the only adverse finding on this point by the court is that it was wrong for Carter to pay "the same terms," *i. e.*, the contract price, for the mattress work done under that contract after October, 1893. This, it is contended, is an erroneous conclusion of law by the Circuit Court of Appeals, as Carter was obliged to pay the contract price, irrespective of whether or not the contractors were making large profits. That the contract price was the fair market price for such mattresses see *post*, p. 503, *et seq.*

Further with respect to (d): The Circuit Court of Appeals bases its only finding of fact which it says indicates "conspiracy" on "the fact alone" that after October, 1893, Carter let other contracts for similar brush mattress work to Greene & Gaynor at similar high prices (Rec., 13427), with ultimate gain to himself through Westcott, and says that this "fact alone" "implies either participation in benefits or collusion on the part of the officer having direction of the work." (Rec., 13427.) This is a new finding, not made by the Circuit Court, and if it be an erroneous finding, then the only link left in the "chain of circumstances" held by the court to indicate conspiracy disappears, and the finding falls.

The facts in that regard are as follows: Only four contracts for brush mattress work were ever let by Carter after October, 1893. (Rec., 9865.)

The first of these was let on November 15, 1894, but the contract price of brush mattresses was only 57 cents a square yard (Rec., 10320), a price only a trifle more than one-half of that complained of (95c-$1.10), and a price which Col. Black, of the engineers, a government witness found by actually building such mattresses, at normal prices for labor, to be much below actual cost, such actual cost being from "60 to 65 cents" per square yard (Rec., 693), and a price at which Col. Bixby of the engineers testifies a contractor under him failed. (Rec., 8492.)

The second contract was let on April 20, 1895, but only the insignificant amount of 7,000 square yards were called for under that contract (Rec., 10337), or less than one-half of 1 per cent. of the mattresses used in the Savannah district.

The other two contracts were both let on October 8, 1896, and both courts hold that neither Carter nor Westcott ever derived any profit therefrom (Rec., 359, 379, 391, 13432), and that Carter "voluntarily" sought and obtained a transfer to London (Rec., 379, 13409) before a dollar had been paid out on these contracts.

So that, when the facts are known, namely, that Carter did not share in the profits of the only two large contracts let after October, 1893, and that as to the only other one of importance, he let it at about one-half of the price complained of, and at a price far below the actual cost of such mattresses, this finding should have been that Carter had no interest in the letting of said contracts, except to do his duty to the United States, and had no expectation of gain therefrom, else he would have remained in charge of that work until it was completed and paid for.

The Circuit Court of Appeals says that "the settled facts above recited" (namely, the facts that the specifications were properly drawn, the advertising properly done, etc.), do not uphold the "charge of conspiracy between Captain Carter and the contractors" (Rec., 13426, 13425); and then says that even if a conspiracy did exist it was not the conspiracy charged in the bill, saying that whether a conspiracy existed "at or prior to the letting of the contract of 1892 can neither be ascertained from the testimony, nor is such inquiry deemed material upon the issue" (Rec., 13426); and that it is only when the innocent facts established are "linked" with the circumstan-

tial evidence mentioned as to the "successive contracts" after October, 1893, that an adverse finding can be made; and now that alleged "fact alone" upon which the adverse finding was made has been shown to have no foundation in fact.

So that the facts, which are undisputed, show that as to the contracts let after October, 1893, there was no gain to Carter, and as a consequence, the findings of the Circuit Court of Appeals thereon are not justified.

This leaves a single conclusion of law as the sole basis of the finding against Carter, and that conclusion is, that under a contract, honestly awarded according to law, and honestly performed, and under which there was used only the materials which the interests of the government demanded should be used, and which were required by that contract, that if the engineer officer has reason to suspect the contractor is making an undue profit, by oppression of his labor or otherwise, then the engineer must require the contractor to put into the work the materials required by that contract, but he must not pay the contract price therefor, and if he does so, then the government can recover all of the profits made by the contractor in any manner whatever, and can find the engineer officer guilty of conspiracy to defraud the government. This, it is respectfully contended, is not good law.

IMPROPER SPECIFICATIONS.

The bill alleges that the specifications were improperly drawn, so as "to consummate said fraud," alleging that among the improper things therein were the calling for brush mattresses by the square yard, etc., which will be taken up and disposed of under the respective heads named.

The Circuit Court refused to hold that the specifications were improperly drawn, which is a finding against the complainant, and the Circuit Court further found that all the specifications, forming a part of the contracts, "were all submitted to and offered by the chief of engineer's office." (Rec., 368.) The Circuit Court of Appeals also expressly held that the charge made against Carter could not be sustained by the "methods adopted in making specifications" (Rec., 13425), which is an express finding against the complainant.

For further details, see *post*, pp. 46; 51; 83.

BIDS BY SQUARE YARD.

The bill alleges that in 1891, under contract No. 4572, Carter called for bids for brush mattresses "by the square yard instead of by the cubic yard, as such mattresses had theretofore been paid for," and alleged that under the following contracts he pursued the same method of purchase.

The Circuit Court held this allegation to be false, saying "this does not seem to be justified by the evidence. Mats had been paid for by the square yard by Col. Black in 1888 and 1890, Col. Bixby 1889 and 1890, Capt. Carter 1891, and Col. Stanton 1892. Whenever mats to any considerable amount were required, they were purchased by the square yard." (Rec., 368.) The Circuit Court of Appeals not only did not disturb that finding, but quoted it, saying that "no reason appears why 'this class of work should not have been dealt with by the square yard.'" (Rec., 13411.)

For further details, see *post*, p. 240, *et seq.*

ADVERTISING.

The bill alleges that Carter advertised a shorter time than was required by law thus suppressing competition.

The Circuit Court held of Carter's action: "This course was approved by the Department. The record makes it very plain that Carter, in this respect, did not depart from the usual course obtaining in like cases" (Rec., 364), and the court concludes: "There is nothing inherent in the matter of notice which suggests any fraudulent intent." (Rec., 364.)

The Circuit Court of Appeals not only affirmed that finding, but quoted it. (Rec., 13410.)

For details, see *post*, p. 74, *et seq.*

PRICES QUADRUPLED.

The bill alleges that the prices paid for brush mattresses were quadrupled, as follows:

(a) That the price of 97¢ per square yard for brush mattresses paid at Cumberland Sound in 1891 under contract No. 4572 was "nearly four times the price of such mattresses theretofore prevailing in said Savannah District."

(b) That the price of 99¢ a square yard for brush mattresses, paid in 1891 under contract No. 4637, was equivalent to $3.56 a cubic yard for the brush fascines in them, while

brush fascines alone would have been brought under that contract for $1.57 a cubic yard.

(c) That the price of $1.05 per square yard paid for brush mattresses in 1892 under contract No. 4820 was "equivalent to $4.20 per cubic yard for brush material."

(d) That the price of $1.05 a square yard for brush mattresses paid in 1892 at Cumberland Sound under contract No. 4820, was "300 per cent. higher than the prices which had prevailed in the same locality."

(e) That the price of 95¢ a square yard paid for brush mattresses at Savannah in 1892 under contract No. 4960, was "equivalent to $3.80 per cubic yard for the brush material."

(f) That the same improper acts set forth in regard to contracts Nos. 4572, 4637, 4820 and 4960 were performed in regard to contracts Nos. 4655, 4963, 5127, 5133, 5253, 5254, 5811, 6049, 6515 and 6517.

These allegations, and similar subsequent allegations herein, so the Circuit Court find, are based on the

> "contention of the government that the fascines should have been procured and measured by the cubic yard, and, when required, made into mats without additional cost, as was done on several former jobs where it appears the amount of mattresses required was nominal." (Rec., 370.)

The Circuit Court not only held that allegation to be false, but found that the method of purchase followed by Carter saved the government 24c a square yard over what would have been paid had the method now contended for by the government been followed. The Circuit Court held: That if loose fascines had been bought at the "reasonable" price of $1.60 a cubic yard, and then made into the big mattresses at the manufacture cost of 23 cents per square yard, paid by Major Black and Captain Gillette, the cost of the big brush mattresses used under the "Big Contract" would have been $1.19 per square yard, instead of 95 cents per square yard which was paid to the contractors under that contract. (Rec., 371.)

The Circuit Court of Appeals not only did not disturb the finding of the Circuit Court, but quoted it. (Rec., 13413.)

For details, showing how that false charge was manufactured, see *post*, p. 249, *et seq.*

THREE MATTRESS DESIGNS AT ONE PRICE.

The bill alleges that in his specifications Carter called for "three different designs of mattresses, any one of which might be called for at his option by the engineer in charge, and to be paid for at the same price," the bill alleging that the design used was cheaper than the other designs, and that hence the specifications were unfair.

The Circuit Court, after finding that the cost per square yard of the three designs was practically the same, held as follows: "I am clearly of the opinion that the evidence shows that there was nothing unusual or improper in Carter's action in treating the case of the three designs as practically the same when considered with reference to the fact that different kinds of work might require different designs on the same contract. Of itself, it disclosed no evidence of a conspiracy to defraud, nor does it tend to do so." (Rec., 365.) The Circuit Court of Appeals not only did not disturb that finding, but quoted it. (Rec., 13410.)

For details, showing why it was for the interest of the government to call for the three designs at one price, etc., see *post*, p. 209, *et seq.*

COST OF MATTRESS DESIGNS.

The bill alleges that "prior to the formation of said fraudulent scheme (January, 1891), the prevailing price in said Savannah District of the first design of mattress was double that of the third design," whereas in 1892, under contract No. 4820, Carter asked for bids on the two designs at the same price.

Not only did both courts refuse to sustain that allegation, which is a finding against the complainant, but the uncontradicted evidence shows that no mattresses of the third design had ever been purchased prior to 1892.

For further details, see *post*, p. 210. (See also Rec., 9865-10125.)

ALLEGED SECRET INFORMATION.

The bill alleges that "before the bidding" Carter gave to the contractors, Greene & Gaynor, secret information as to which mattress design "would be called for," so that they could underbid other bidders.

There is no pretense of even a shred of evidence to support this allegation, and the Circuit Court not only holds "there

is no direct evidence in the record to sustain this charge" (Rec., 365), but holds affirmatively that competitive bidders were informed which design would probably be used, saying "a number of those intending to bid, *i. e.*, C. C. Ely, agent for P. Sanford Ross, W. F. McCauley and L. Y. Schermerhorn, were advised that design 3 would be mainly used. Contractors J. W. Rutherford, A. R. Stewart, J. L. Grim and R. G. Ross also knew that fact. There seems to be little ground for complainant's contention in that behalf." (Rec., 366.)

The Circuit Court of Appeals not only did not disturb that finding, but held that the charge against Carter could not be supported by his "treatment of proposed bidders." (Rec., 13425.)

For details, see *post*, p. 68, *et seq.*

MULTIPLE MATTRESSES.

The bill alleges that the specifications required the mattresses to be made singly, and that "other proposed bidders had to estimate" therefor, whereas Carter allowed Greene & Gaynor to sink mattresses in multiple, which "was very much cheaper for the contractor."

The Circuit Court not only refused to find that the specifications required single mattresses, but held that "the introduction of multiple mats into the work on the Savannah harbor was judicious and essential" (Rec., 373), and "is fully justified by the evidence." (Rec., 372.)

That court further held, affirming the testimony of Col. Bixby, of the Engineers, that "the contractors gained little or nothing by the use of multiple mats, and that the government was getting its work done at less expense." (Rec., 372.)

The Circuit Court of Appeals not only did not disturb the finding of the Circuit Court, but quoted it. (Rec., 13413-14.)

For details, see *post*, p. 126, *et seq.*

QUANTITIES ESTIMATED AND USED.

The bill alleges that it was improper for Carter to have used a different amount of brush mattresses from that originally estimated.

The Circuit Court held that by so doing Carter "was thus able to keep within the estimate of the cost of the whole and within the appropriation, while at the same time he accomplished the results sought for" (Rec., 369); and that court con-

cluded as follows: "In and of itself no improper motive can be deduced on Carter's part from his course in this respect." (Rec., 369.)

The Circuit Court of Appeals not only affirmed that finding, but held that "the discretion vested in the officer in charge [Carter] was rightly exercised in greatly extending mattress work" (Rec., 13426), and that its opinion "is not to be understood as intimating doubt, either of authority to make such changes in the interest of the government, nor that such substitutions were not effective for a great work in the improvement of harbors." (Rec., 13423.)

For further details, see *post*, p. 119, *et seq.*

INFERIOR MATERIAL.

The bill alleges that Carter permitted the contractors to use "the poorest and cheapest and most inferior material which he could allow passed."

The Circuit Court not only refused to sustain that allegation, which is a finding against the complainant, but referred to the testimony of witnesses who sustained the character of the work accepted, saying that those witnesses are "above suspicion." (Rec., 379.)

The Circuit Court of Appeals did not disturb that finding, which is an affirmance thereof.

For details, see *post*, p. 292, *et seq.*

QUANTITY OF MATERIALS.

The bill alleges that "a large part of the material required by the designs of brush mattresses in the specifications was omitted."

The Circuit Court not only refused to sustain that allegation, which is a finding against the complainant, but especially mentioned the testimony of Col. Bixby, of the Engineers, as conclusive that "the contractors used more material at Savannah and Cumberland Sound than was required of them by their contract." (Rec., 378.)

The Circuit Court of Appeals did not disturb that finding, which is an affirmance thereof.

For details, see *post*, p. 159, *et seq.*; 499.

INSPECTION.

The bill alleges that Carter arranged so that there would be "little of any inspection" of the mattress work done by Greene & Gaynor.

The Circuit Court not refused to sustain that allegation which is a finding against the complainant, but held that the mattresses were so well built that "notwithstanding the pressure of the great weight imposed upon them," and the fact that they "had to be transported many miles," and through "rough water," they nevertheless "measured up so well." (Rec., 373.)

The Circuit Court of Appeals did not disturb that finding which is an affirmance thereof.

For details, see *post*, p. 193, *et seq.*

MILITARY FASCINES.

The bill alleges that under the contract Carter ought not to have used the usual engineering fascines, but should have used military fascines, *i. e.*, bundles of bare poles.

The Circuit Court specifically holds against the complainant, saying that the specifications should not be construed to mean military fascines. (Rec., 377.)

The Circuit Court of Appeals, not only affirmed the finding of the Circuit Court, but says that "the evidence does not sustain the contention that military fascines were intended." (Rec., 13415.)

For details, see *post*, p. 103, *et seq.*

WITHHOLDING SPECIFICATIONS.

The bill alleges that specifications were withheld from bidders, competing against Greene & Gaynor, and that such persons were hindered in making bids.

The Circuit Court held against the complainant, saying of Carter's action, that "the same method had theretofore been pursued by engineers formerly in charge of improvements in that vicinity" (Rec., 366), and that "it is difficult to see how any sinister motive can attach" to Carter's action. (Rec. 367.)

The Circuit Court of Appeals affirmed that finding. (Rec. 13411.)

For details, see *post*, p. 85, *et seq.*

OPENING OF BIDS.

The bill of complaint alleges that bidders competing against Greene & Gaynor were treated unfairly.

The Circuit Court held that "there is nothing in the record with regard to the opening and letting of the bids in and of itself calculated to cast suspicion upon Carter's conduct." (Rec., 368.)

The Circuit Court of Appeals not only did not disturb that finding, but quoted it. (Rec., 13411.)

For details, see *post*, p. 63, *et seq.*

NUMBER OF BIDDERS.

The bill alleges that there was a very small number of bidders to compete on the contracts.

The Circuit Court held: "It appears that there were about 15 bidders present at the opening of the bids on the 1892 contract." (Rec., 368.) The Circuit Court of Appeals did not disturb that finding.

For further details, see *post*, p. 90, *et seq.*

UNFAIR DISCRIMINATION.

The bill alleges that "Carter applied such stringent and unfair construction of the specifications" in a contract held by one Albert J. Twiggs, as to ruin him and thus prevent his again competing against Greene & Gaynor.

The Circuit Court held that Twiggs was not discriminated against; that he was taker of a bribe; that he "lacked both the capacity and the financial ability" to handle his contract; that he "became embittered"; and that his claims of oppression were false. (Rec., 375-76.)

The Circuit Court of Appeals did not disturb that finding, which is an affirmance thereof.

For details, see *post*, p. 515

DIVISION OF PROFITS.

The bill alleges that the profits of the contractors were divided between those contractors and Carter as follows:

(a) That prior to "September 16, 1892," amounts of $16,000, were traced with reasonable certainty from the profits of the contractor back into the possession of Oberlin M. Carter."

(b) That "commencing with the contract of No. 4820 of September 16, 1892," profits of "over two million dollars" were divided "from time to time" between Carter and the two contractors in equal thirds.

As to (a), the Circuit Court held specifically against the complainant, saying that "complainant's prayer as to them is denied, both in regard to the sources from which they were procured and as to the title to the securities in which they have been invested." (Rec., 385.) (See, also, Decree, Rec., 390.)

The Circuit Court of Appeals expressly affirmed that finding. (Rec., 13432.)

As to (b), the Circuit Court not only refused to sustain the allegations of the complainant, which is a finding against the complainant, but held expressly that Robert F. Westcott was a secret "partner of Greene & Gaynor," and received "one-third" of their profits (Rec., 387-88), and refused to even hold that Carter knew of that partnership.

The Circuit Court of Appeals did not disturb that finding, which is an affirmance thereof.

Alleged First Division.

The bill alleges that between December, 1891, and November 7, 1892, Carter received $16,000 from Greene & Gaynor.

Both courts held against the complainant, the finding being that neither Carter nor Westcott received any money whatever from them, as has just been shown.

Alleged Subsequent Divisions.

The bill sets out a table of alleged divisions of money between Greene, Gaynor and Carter, from January 3, 1893, to July 6, 1897, and numbered from 2 to 32, inclusive, with alleged investments thereof by Carter.

Divisions 2, 3, 4 and 5.

The bill alleges that Carter received the moneys charged under said divisions 2 to 5, inclusive, from Greene & Gaynor.

Both courts held that in divisions 2 to 5, inclusive, Westcott received a total of $53,650 from Greene & Gaynor, and that during the same period he gave $37,150 to Carter ($39,150—2,000) (Rec., 385-88; 13432).

At about the same time Carter's wife died and left $36,600 in currency, which was taken by her father, R. F. Westcott. The Circuit Court held that instead of returning to Carter the $36,600 in currency Westcott got from the estate of Carter's wife, Westcott substituted therefor a part of the currency he received from Greene and Gaynor. (Rec., 386.)

Division 6.

The bill alleges that on May 8, 1893, Carter received the $15,000 charged under this division from Greene & Gaynor.

The Circuit Court held that Carter received nothing from Greene & Gaynor, but that Westcott, their partner, received $3,500 which he used, or invested for himself. (Rec., 388.)

This finding was not disturbed by the Circuit Court of Appeals.

Division 7.

The bill alleges that on June 5, 1893, Carter received the $12,500 charged under this division from Greene & Gaynor.

The Circuit Court held that Carter received nothing from Greene & Gaynor, but that Westcott, their partner, received $12,500 from them, which Westcott used or invested for himself. (Rec., 389.)

That finding was not disturbed by the Circuit Court of Appeals.

Divisions 8 *to* 22 *inclusive.*

The bill alleges that the moneys charged under those divisions 8 to 22 were received by Carter from Greene & Gaynor.

The Circuit Court found that Carter received no money from Greene & Gaynor, and that all the sums which were paid out by Greene & Gaynor under those divisions were in fact received by their partner, R. F. Westcott (Rec., 387; 391), as follows:

Paid out by Greene & Gaynor.

July	11,	1893	$36,075
Aug.	7,	1893	13,075
Sept.	6,	1893	25,175
Oct.	10,	1893	12,075
Nov.	6,	1893	6,000
Dec.	4,	1893	21,075
Jan.	8,	1894	16,575
Feb.	5,	1894	18,000
Mar.	5,	1894	8,075
July	9,	1894	30,000
Sept.	10,	1894	100,000
Oct.	5,	1894	20,000
Nov.	12,	1894	10,000
Dec.	19,	1894	8,000
		Total,	$324,125.00

Deposited by Westcott.

July	11,	1893	34,500
Aug.	9,	1893	13,000
Sept.	6,	1893	24,000
Oct.	10,	1893	11,000
Nov.	8,	1893	6,000
Dec.	4,	1893	21,000
Jan.	8,	1894	16,500
Feb.	5-6,	1894	18,000
Mar.	5,	1894	7,400
Sept.	11,	1894	103,022.78
Oct.	24,	1894	4,000
Dec.	4,	1894	53,000
Dec., '94, and Jan., '95			8,200
		Total,	$319,622.78

This finding was not disturbed by the Circuit Court of Appeals.

Divisions 23 to 31 inclusive.

The bill alleges, besides the foregoing, that the money received by Westcott under divisions 23 to 31 inclusive in 1895-96, from his partnership with Greene & Gaynor, was received by Carter during Westcott's absence in Europe.

Both courts refused to so find. The evidence shows that Westcott received $150,000 a few days before he went to Europe; that out of it he paid the $35,550 which he had borrowed to purchase the Eighth avenue property, "for myself" leaving $114,450 remaining in his safety-deposit vault when he went to Europe, and Carter invested for Westcott during Westcott's absence $113,827.08 thereof under written powers of attorney from Westcott. When Westcott returned from Europe, he took possession of those securities, sold part of them for his own benefit, and both courts found that he had the remainder in his possession in October, 1897; and Westcott's bank book, showing the deposits of a large amount of that money in Westcott's private bank account, and the checking out thereof to pay for said securities, was turned over by Carter to Westcott on Westcott's return, and that book was reluctantly produced by the complainant on demand of the defendant, with the admission that it came from Westcott's private papers.

For details, see *post*, pp. 298; 314; 391-2; 402; 417; 422; 441; 446; 448.

Division 32.

The bill alleges that on July 6, 1897, Carter received $126.-691.67 from Greene & Gaynor.

This allegation is pure fiction, as the Circuit Court held there was no division at all, and that neither Carter nor Westcott got a dollar of the profits of Greene & Gaynor under those contracts. (Rec., 38; 389; 391.)

The Circuit Court of Appeals affirmed that finding. (Rec., 13432.)

For details, see *post*, p. 403, *et seq.*

EXCESSIVE PRICES.

The bill alleges, as hereinbefore set forth in detail, that on account of improper specifications, improper advertising and improper award of the contracts, the prices bid and paid for brush mattresses at public letting were excessive.

As has been seen, both courts held that the specifications were properly drawn, that the advertising was properly done, and that the contracts were properly and honestly awarded as required by law; hence the prices *must* have been proper.

The only testimony that the prices were excessive is that of the prosecuting witness Gillette and five of his employees, who are discredited by the trial court in the following words:

"There is discernible some more zeal on Gillette's part than comports with an impartial investigation of his predecessor's transactions, which seems also to have had its effect upon those who were his subordinates at the time of taking their evidence." (Rec., 378.)

Moreover, the testimony of Gillette and his employees as to prices is based upon a price of labor of 17 cents a day, which was obtained through peonage of labor by the contractors, and not upon the market value of labor.

On the contrary, based upon normal prices for labor, the evidence that the prices paid were the fair and usual prices for such materials and labor depends on the statements and testimony of 12 distinguished officers of the United States Army, 5 civil engineers and inspectors, and 12 disinterested, competitive contractors, all of whom the court holds to be "above suspicion." (Rec., 379.)

For details, see *post*, p. 503, *et seq.*

CHECKS IN TWO BATCHES.

The bill alleges that it was usual for Carter to make out checks to the contractors in two batches "the better to secure his share."

Both courts refused to sustain the allegations of the complainant, which is a finding against the complainant, the evidence showing that the checks had to be drawn in "two batches" because the United States kept its funds in two different depositaries, and there is no pretense that any of said checks represented Carter's alleged share, or that Carter received any of said checks.

For details, see *post*, p. 97.

ALLEGED TRIPS TO NEW YORK.

The bill alleges that the contractors paid Carter's expenses of $75 a trip to go to New York to get his third of their profits.

Both courts refused to sustain the allegations of the complainant, which is a finding against the complainant, the Circuit Court of Appeals holding that "it does not appear, however, that Carter took part in or was present at any of the divisions referred to between the contractors and Westcott, nor is there any direct evidence that he was informed thereof." (Rec., 13425.)

The record shows that Carter never received any $75 at

all; that on 14 occasions it was purely fictitious, having been invented by the government's accountant, and that when it did exist, the only proof of payment ever made was to Greene and to Gaynor.

For details, see *post*, p. 418, *et seq.*

WESTCOTT A PARTNER.

The bill alleges that when Carter did not go to New York, his "third" would be paid to R. F. Westcott, who then turned the proceeds over to Carter.

Both courts held against the complainant, the holding of the Circuit Court being that Westcott was a partner with Greene & Gaynor on his own behalf (Rec., 387), and that he received his share of the profits (Rec., 388); and this holding was not disturbed by the Circuit Court of Appeals, which is an affirmance thereof.

For details, see *post*, p. 483; 489.

ALLEGED CONSPIRACY IN 1897.

The bill alleges that on January, 1897, Carter met the contractors and agreed with them to renew the alleged fraudulent scheme of 1891, and that Carter advanced money to begin work under the 1896 contracts, and in July, 1897, he approved vouchers for inferior work done under these contracts, and shared in the profits derived therefrom.

Both courts held against the complainant; the finding being that neither Carter nor Westcott ever advanced any money to begin work under those contracts, that the work done under said contracts and the vouchers therefor were in accordance with the terms of said contracts, and that neither Carter nor Westcott ever shared in the profits derived therefrom. (Rec., 38; 391; 13432.)

For details, see *post*, p. 403, *et seq.*

RELATIONS WITH GREENE.

The bill alleges that Carter "frequently resorted to borrowing money from Benjamin D. Greene, one of the contractors."

The Circuit Court held against the complainant, the finding being that Carter never borrowed any money from Greene, the only transaction being a loan by Greene to Carter's brother

in 1886 when no contracts were in existence, which loan was repaid with interest in 1888, before Carter ever had charge of any contract work (Rec., 362), and that court further held with regard to the relations of Carter with Greene and Gaynor, and which are complained of, that "there is nothing to show that at the time there was anything improper contemplated by either of them." (Rec., 363.)

The Circuit Court of Appeals did not disturb that finding, which is a finding against the complainant.

For details, see *post*, p. 455, *et seq.*

SECRET INVESTMENTS.

The bill alleges that Carter made investments "secretly" in "stocks, bonds, loans and real estate."

Both courts refused to so hold, the evidence showing that Carter made no secret investments whatever.

For details, see *post*, p. ..... (R. 7771)

CARTER'S INCOME AND EXPENSES.

The bill sets forth a table giving Carter's alleged income and expenditures.

Both courts refused to sustain the claim of the complainant, which is a finding against the complainant as to this; the record showing that Carter's income consisted of his army pay, the income from the property left him by his wife who died in 1892, sums earned by him as consulting engineer on authorized matters, and money given to him by his father-in-law, R. F. Westcott, all of which is accounted for in detail, both as to the receipts and expenditures, in Defendant's Exhibit 96-A, 96-B, 96-D and 96-F.

For details, see *post*, p. 422, *et seq.*

THE EIGHTH AVENUE PROPERTY.

The bill alleges that Carter bought the Eighth avenue property in New York through Westcott.

Both courts refused to so hold, that property having been bought by Westcott with his own money and for himself; and Westcott admitted that he bought the property "for myself," that he rented the property while he owned it, and that those rents were paid over to him. (Rec., 11652-57.)

For details, see *post*, p. 448.

THE GORDON LOAN.

The bill alleges that Carter loaned $10,000 to Bierne Gordon, and put the property in Westcott's name, "Westcott having no interest therein."

Both courts refused to so hold, the evidence showing that Westcott eventually drew his own check for the loan, so as to have Gordon's endorsement on the back thereof, and that the loan was Westcott's.

For details, see *post*, p. 454.

THE ORANGE PROPERTY.

The bill alleges that Carter invested money which he received from Greene & Gaynor in real estate at Orange, New Jersey.

Both courts held that Carter never got any money from Greene & Gaynor (Rec., ...), the evidence showing that the money which Carter did invest in Orange real estate came from the estate of Carter's wife.

For details, see *post*, pp. 319-20.

RELIEVED FROM DUTY AT SAVANNAH.

The bill alleges that early in 1897 Carter learned he was to be removed from duty at Savannah by General Wilson.

Both courts held that Carter left Savannah "voluntarily." (Rec., 362; 13409.)

For details, see *post*, p. 469, *et seq.*

CARTER'S PRIVATE PAPERS.

The bill alleges that a large number of "the official files of the office" had been packed by Carter in a "file case" with his private papers to be shipped away.

Both courts refused to so hold; the record showing that when Carter was ordered to London he had some of his assistants pack up his effects, and that nothing except a few stray books, etc., lying around the office were included among Carter's private papers, and that those got there simply because the office assistant packing up the papers did not know what else to do with them; and that Carter left all of his private papers in the engineer office at Savannah until his return

from Europe. That those papers contained nothing detrimental to Carter is shown by the finding of the Circuit Court of Appeals which held that in this entire record (which includes all of those papers which the complainant desired to use) there is no "direct evidence" of conspiracy to defraud the United States. (Rec., 13425.)

For details, see *post*, p. 509.

CARTER'S ARRIVAL IN NEW YORK.

The bill alleges that on arriving in New York in September, 1897, Carter expected to be arrested, and took out of his safety deposit box $414,437.50 in securities and gave them to Greene & Gaynor "for safe keeping."

Both courts refused to so hold; but held that Carter received those securities from Westcott in October, 1897 (Rec., 391; 13432), the evidence showing that Carter received them in the most public way and in the law offices of Thomas Thatcher and of Elihu Root, whose partner was Westcott's attorney.

For details, see *post*, p. 408, *et seq.*

WESTCOTT'S SECURITIES.

The bill alleges that Carter endeavored to have Westcott testify falsely that the securities belonged to him (Westcott). The Circuit Court held that the money Westcott received from Greene and Gaynor belonged to Westcott (Rec., 387); hence the securities purchased therewith belonged to Westcott. The Circuit Court of Appeals did not disturb that finding.

For details, see *post*, p. 320, *et seq.*

WESTCOTT'S TESTIMONY.

The bill alleges that Westcott "would not consent to go upon the stand otherwise than to tell the truth."

The only pretense of any evidence against Carter is the testimony of Westcott, given on behalf of the complainant in Carter's absence. Carter offered to let both the Circuit Court and the Circuit Court of Appeals read that testimony, and although it was not admissible in evidence, Carter of-

fered to permit it to be admitted if the courts found it to be the truth. Both courts refused to admit that testimony in evidence.

For details, see *post*, pp. 455, 489, *et seq.*

WESTCOTT'S FLIGHT TO EUROPE.

The bill alleges that Westcott left for Europe in 1897 to avoid testifying against "the husband of his dead child."

Both courts refused to so hold, the evidence showing that Westcott fled to Europe to prevent his partnership with Greene & Gaynor from being discovered, and gave the money in controversy to Carter in order to shield himself. Besides, a military court at that time had no power to compel Westcott to testify at all, so he could not have gone away to avoid testifying against Carter.

For details, see *post*, p. 489.

I. STANTON CARTER.

The bill alleges that I. Stanton Carter was familiar with "the fraudulent character of the work done" at Savannah.

Both courts held that the work done at Savannah was not fraudulent. (Rec., 379; 13423.)

For details, see *post*, p. 31, *et seq.*

CARTER'S COURTMARTIAL.

The bill alleges that in his trial by courtmartial, there was "furnished proof so plain of the guilt of Oberlin M. Carter" that he was convicted.

The Circuit Court agreed with Senator Edmunds that there was no evidence before the courtmartial justifying Carter's conviction (Rec., 360; 380), and this finding was not disturbed by the Circuit Court of Appeals.

For details, see *post*, p. 477, *et seq.*

WESTCOTT'S INTEREST.

The bill alleges that "it was found by the government's expert accountant," E. I. Johnson, that Westcott had no interest in the moneys he received from Greene & Gaynor, but that he was simply a "fence" for Carter.

Both courts held against the complainant, the Circuit Court holding specifically that this same "expert accountant" in his sworn statements to the court "has in a number of instances forced balances and drawn strained conclusions." (Rec., 380.)

This same E. I. Johnson furnished information to Attorney General Griggs. (Rec., 6355, 6369, 6439-44.)

MISCELLANEOUS ALLEGATIONS.

All material facts not hereinbefore specifically mentioned were decided adversely to the complainant, as will be seen by reference to the opinions of the courts, it being understood that the elementary rule of law governs, under which, the burden of proof being on the complainant, a refusal to find in complainant's favor, is an adverse finding.

That the evidence supports the findings against the complainant, see the following pages:

REFERENCES TO THE EVIDENCE.

These references will be made in substantially the same order as the Requests for Findings, which they support. In making these references, the objections by complainant's solicitor have been omitted, as they are often very lengthy; and in making quotations from the testimony, etc., immaterial parts have been omitted, where indicated thus * * *

—A—

The Matters in Issue.

The written contracts under which the work in controversy was done are Complainant's Exhibits 78, 84, 85, 90, 92, 94 and 95. (See also Ex. 216; 319.)

For Greene's testimony that he and Gaynor owned all the stock of the Atlantic Contracting Company, see court martial record. (Rec., 3565.)

The total of all contracts in issue (exclusive of the 1896 contracts) is $2,551,000.21 (Ex. 216; 319), of which the big contract amounted to $2,110,869.46 (the same exhibits); hence the big contract is about five-sixths in amount of all the contracts really in issue.

This is figured out in detail in the Wyman record, pages (Rec., 8137-38; 8140-42.)

There is no pretence that any of the securities in issue were purchased with money coming from the 1896 contracts. (Rec., 7299; 7319.)

As the complainant claims five-sixths of the securities in issue came from the big contract, that contract is the place to look for poor work, if there was any.

—B—

The Charges.

The charges against Carter are found in the bill of complaint herein, and in the various proceedings which have taken place in connection with this matter. Those charges consist of all kinds of general and indefinite attacks upon Carter, and upon the work, the object apparently being to

force Carter to prove himself innocent of the multitude of charges made against him.

Carter has therefore selected what seem to him to be the principal charges against him, and has stated those charges as he understands them, and now refers to the evidence which disproves those charges. If any trifling charges have been omitted, it is because space forbids chasing up every weak or spiteful charge which has ever been invented.

If it be considered that any serious charges are not met herein, then Carter asks leave to meet those charges by a supplemental reference to the evidence.

For the testimony of Stimson, and other evidence with regard to where Carter received the securities, see Reference herein No. 25. (Rec., 8881.)

For the complainant's claim that Westcott received the securities from Greene in September, 1897, see bill of complaint. (Rec., 33.)

For the evidence showing that, instead of getting those securities from Greene in September, 1897, Westcott bought most of those securities himself in 1893 and 1894, see References herein Nos. 25 and 37.

For the evidence that Westcott cancelled Carter's access to Westcott's safe deposit box wherein those securities were kept, and that Carter had no access to those securities, see Reference No. 31.

For the evidence that Westcott never left Carter without putting his arms around Carter's neck and kissing him, see (Rec., 5712).

For the special evidence that Carter knew nothing of any deal between Greene and Gaynor and Westcott (if any there was), see Requests (and References) Nos. 54, 52 and 25.

For the evidence as to Westcott's wealth, his state of health, etc., see Reference herein No. 25.

For the evidence that Carter had reason to suppose that what Westcott gave him was in reality the share of his estate which Carter's wife would have inherited, had she lived, see Reference herein No. 25.

For Westcott's agreement to make Carter his heir in place of Carter's deceased wife; Westcott's having Carter hire a lawyer; the carrying out of that agreement, etc., see Reference herein No. 25.

—C—

CARTER'S EFFORTS TO OBTAIN A TRIAL IN A COURT OF JUSTICE.

For the evidence on this subject, see Reference herein No. 51.

—D—

THE WORK WAS A GREAT SUCCESS.

The work cost less than Captain Carter originally estimated it would cost, and less than Congress appropriated to pay for it.

Estimate of cost made by Captain Carter June 30 1890 (Annual Report Chief of Engineers, 1890, p. 1263)		$3,500,000.00
Appropriations by Congress:		
Sep. 19, 1890	$350,000.	
Jul. 13, 1892	318,750.	
Mar. 3, 1893	1,000,000.	
Aug. 18, 1894	975.000.	
Mar. 2, 1895	856,250.	
Total appropriations (Annual Report of Chief of Engineers, 1896, p. 1222)		$3,500,000.00
Expenditures:		
Total to June 30, 1896 (Annual Report of Chief of Engineers, 1896, p. 1224)	$3,462,549.99	
Expended after June 30, 1896 (Annual Report of Chief of Engineers, 1897, p. 1496) (143,-641.4 cu. yds. dredging @ 16c)	22,982.62	
Total expenditures under project		$3,485.532.61
Balance of appropriation not used		**$14,467.39**

General W. P. Craighill, the retired Chief of Engineers, and Past President of the American Society of Civil Engineers, one of the most distinguished engineers of the world, who was formerly the Division Engineer in charge of the Division in which the Savannah work lay, and who is personally familiar with all of the work done, testifies in Carter's favor. His testimony on that point has been given in Request for Findings, D.

Concerning his familiarity with the Savannah work, General Craighill testifies:

> "A. I have been acquainted with the Savannah River for many years. My first duty when I came from West Point was on this river, in 1853." (Rec., 3425.)

General Craighill is corroborated in his statements concerning the success of Carter's work by other witnesses, as follows:

George Y. Wisner, Director of the American Society of Civil Engineers, formerly the engineer in charge of the great Eads jetties at the mouth of the Mississippi River, and then a member of the United States Deep Waterway Commission, having in view the construction of a canal from the Great Lakes to the ocean, after an exhaustive examination of the work at Savannah, testifies in Carter's favor:

> "Q. *As an engineering work, is that work a success?*
> A. *It certainly is.*" (Rec., 2626.)

L. Y. Schermerhorn, a civil engineer of great experience, and President of the American Dredging Company, testifies of the work done under the big contract:

> *"I would call it most unqualifiedly an engineering success. I think there is not another one like it in this country."* (Rec., 3450.)

E. A. Gieseler, the principal assistant engineer at Savannah during the execution of the big contract, who had charge of the surveys of the river, and who hence knew its conditions (and who was a witness for the Government in this case), testifies, on cross-examination, as follows:

> "Q. Do you happen to know how much the depth of water has increased in the Savannah River since Captain Carter has had charge?
>
> A. Yes; I could not say exactly since he took charge, I can't say; but comparing it with the time I first came

here in 1889, the available depth of water was then about 13 feet at low water, and it is now 20 feet at low water.

Q. The project contemplated 26 feet at high water?

A. *The project contemplated 26 feet; the result was attained at the end of the fiscal year of* 1896.

Q. Do you know whether or not it has been obtained within the appropriation?

A. I think I can safely say it has; I don't know the exact figures, but I believe it has.

Q. And within the estimate of the project?

A. Within the estimate of the project, too, practically; it may be a little different; I don't think it is, I think it is within the estimate of the project." (Rec., 1329.)

A. S. COOPER, who was the assistant engineer in charge of the construction work at Savannah during the greater part of the big contract, and who is now a witness for the Government, testifies, on cross-examination, concerning the work done under the big contract as follows:

"Q. Is it good work?

A. Yes, sir; it has accomplished what it was intended to accomplish.

Q. *The work has accomplished what it was intended to accomplish?*

A. *It has, undoubtedly.*" (Rec., 1210-1211.)

The special BOARD OF ENGINEERS (consisting of COLONEL GILLESPIE and MAJORS RAYMOND AND ADAMS), which had been appointed in September, 1897, to examine into Captain Gillette's charges against Captain Carter's work, and which went to Savannah to inspect that work, acknowledged its success, declined to inspect it, and never went near it, because, in speaking to Captain Carter before the Board, when the question of an inspection of the work was being discussed, CAPTAIN GILLETTE himself said:

"There is no doubt that the depth of water you claim has been obtained in Savannah Harbor. *I have no engineering objections to any of the mattresses that have been put in.*" (Rec., 676.)

LYMAN E. COOLEY, member of the American Society of Civil Engineers, and a consulting engineer of large experience, testifies:

"Q. I would like to get your opinion, as an expert engineer, on the technical meaning of this testimony. It is

claimed by the complainant's counsel, that there is some doubt about what it means, and therefore I ask you as an expert engineer to state what these technical terms mean. I read now from page 451 of the proceedings before the Board of Engineers, in the year 1897, as follows:

'Captain Carter: I would like the Board to examine the physical condition of the work.

Colonel Gillespie: (Colonel Gillespie was the Chairman of the Board.) Is there any part of the work above the water that the Board can see?

'Answer: Not in the last two contracts. That is all under water. The other is above water. If there is any question as to the condition of the work, or as to its successful accomplishment, I would like to have the Board see it.'

That answer was by Captain Carter. Captain Gillette, the prosecuting witness for the Government, stated as follows:

'Captain Gillette: There is no doubt that the depth of water that you claim has been obtained in Savannah Harbor. I have no engineering objections to any of the mattresses that have been put in.'

Does that mean that the work was a success or not?

A. *It certainly does, if it means anything.*

Q. I now call your attention to the testimony of General W. P. Craighill, Chief of Engineers at the time the work was substantially completed, about which Mr. Erwin makes some controversy, and ask you what the technical meaning of this testimony is with regard to the question of whether the work was a success or not. I quote:

'Question: What, in your opinion, is the result, whether successful or not, of the work done by Captain Carter, in Savannah River and Harbor?

Answer: I think it is one of the most successful operations of which I have any knowledge, either in this or any other country.

Question: And to whom is the credit due for attaining those results?

Answer: I attribute it entirely to Captain Carter.'

Now, does that technical language mean that that work was a success or not?

A. *It means that it was a success.*

Q. Does it mean that it was more than a bare success?

A. Yes, sir.

Q. Does it mean that it was a great success, as the term is usually used?

A. I should judge that General Graighill was enthusiastic in regard to the matter.

Q. I call your attention to the testimony of Mr. George Y. Wisner, director of the American Society of Civil Engineers, in which he gives some engineering testimony which I would like to have you state its meaning.

'Question: As an engineering work, is that work a success?

Answer: It certainly is.'

Does that mean that the work was a success or not?

A. *It means that it is an unqualified success.*

Q. I call your attention to the testimony of Mr. L. Y. Schermerhorn, Civil Engineer and President of the American Dredging Company, in which he states:

'I would call it most unqualifiedly an engineering success. I think there is not another like it in this country.'

Would that mean, in common language, that the work was a great success?

A. *It would.*" (Rec., 8537-39.)

CAPTAIN M. P. USINA, who swore he had been a pilot on the Savannah River and Tybee Bar nearly 39 years," testified in 1898 concerning the Savannah Harbor:

"Q. What is the navigable depth at the present time?

A. 26 feet.

Q. *Do you happen to know whether that has been secured during the time Captain Carter has been here?*

A. *Yes, sir; it has.*" (Rec., 3535-36.)

CAPTAIN JOHN FITZGERALD, who swore he has been a pilot on the Savannah River for "thirty-nine years," testified in 1898 concerning the Savannah River and Harbor:

"Q. Do you remember what the depth of the river was in 1884, about that time?

A. Between 17½ and 18 feet.

Q. And the depth now?

A 26 feet.

Q. Are you familiar with the improvements upon the river made under Captain Carter?

A. Yes, sir.

Q. Has the depth resulted from those improvements?

A. 26 feet?

Q. That has been the result of the improvements made?

A. Yes, sir." (Rec., 3538.)

A further acknowledgment of the entire success of the work done at Savannah by Captain Carter is found in the report of a special BOARD OF ENGINEERS in 1898, which report was introduced in this case by the complainant. (Rec., 4591.) That Board, which was composed of MAJORS C. B. SEARS, W. H. BIXBY and T. W. SYMONS, Corps of Engineers, was specially appointed to investigate the Savannah work, *after Captain Carter had been tried by the court martial,* and reported on September 28, 1898, that the improvement of Savannah Harbor, in accordance with the project under which the work of the contract of 1892 had been done,

> "*was practically completed in* 1896, *at which time there was a very great improvement in the channel depth, amounting to a clear gain of about* 9 *feet.*" (An. R. C. E. 1900, p. 1925.) * * * "*The execution of the existing plan of improvement for* 26 *feet depth* * * * *has been accomplished by such successful results up to the present time that no essential changes are necessary.*" (An. R. C. E. 1900, p. 1926.)

On December 4, 1900, another BOARD OF ENGINEERS, of which Hains and Gillette were members, submitted a report on those harbor works. That report has been introduced in this case by the Government, and although the works of improvements completed by Captain Carter in 1896 consisted of some 17 miles of training walls, etc. (costing more than $2,000,000, and on which nothing had been expended in repairs), that Board recommended an expenditure of only $62,175 for future "repairs to training walls" (Rec., 4588), more than $51,000 of which sum was for stone to fill gaps, where the walls had settled into the soft bottom of the river. *No better or more economical results could possibly have been expected!*

That the work is still accomplishing good results is shown by the annual report of COL. J. B. QUINN, the Engineer in Charge, who reported in 1903:

> "In the North Channel, between the years 1894 and 1900, there was a resultant scour, from the City to Tybee Roads, of 1,000,000 cubic yards, whereas in the South Channel, where no jetties had been built, there has been a fill of about the same amount in the same time. * * * *The harbor* * * * *has been improving materially by sour procured by the jetties.*" (Rec., 8259-60.)

COL. J. B. QUINN, Corps of Engineers, the Engineer in charge of Savannah Harbor, testified in Carter's favor in October, 1904:

"Q. How do the training walls, jetties and other harbor works in Savannah harbor last apparently?

A. They are still standing in apparent good order, the most of it that I have looked at. (Rec., 4503.)

Q. I merely inquire as to the present condition?

A. Seem to be in fairly good order as far as my observation goes; they didn't require much repair, that is, with two or three exceptions; I made some repairs to the upper work.

Q. To any considerable amount?

A. Not very extensive; we put in about 12,000 cubic yards of rock to bring up some stone jetty that was submerged." (Rec., 4504.)

As to the distance between Savannah and the ocean, as to the Savannah river, and its banks and the mud and sand, as to the increase in the ocean commerce of Savannah as reported by its Mayor and others, as to the completion of the work within the appropriation, etc., see (Rec., 7990-92; 8205; 8207; 8313-14; 8421.)

The project for the Savannah harbor improvement specified "*a channel depth of* 26 *feet at mean high water from the city to the sea.*" (An. Rep. C. E. 1890, p. 1259.)

The width of that "channel" was not specified, but was merely *a navigable width, i. e.*, about 100 feet. (Rec., 8735.)

To maintain a navigable width of channel, in such soft bottom as that of the Savannah River, would require *original* dredging to a width of at least 300 feet, so as to allow for the filling from the side slopes into the dredged cuts. So successful was the work done under the big project that, *although a final bottom width of only about* 100 *feet was estimated for, the* 26*-foot channel had a width of* 240 *feet at its narrowest point when the work was completed.* (Rec., 8737.)

There is no evidence to the contrary.

In seeking to disparage Capt. Carter's work, the complainant's solicitor now claims the project for a depth of water of 26 feet from Savannah to the sea was not completed within the estimated cost, because, although Carter admittedly obtained a depth of 26 feet from the city to the sea within the estimated cost, he did not execute *at each point* exactly the work which he originally estimated might be necessary to complete the project successfully.

That contention has no merit, because the *project* was the getting of 26 feet in depth at mean high water from the city to the sea. To accomplish that there were works which it was thought might be necessary, or might not be, as the occasion arose. (Rec., 8725-8726.)

In order to estimate the cost of securing the depth of 26 feet sought for under the project, the jetty work and dredging then believed to be necessary were set forth, and the total cost was estimated at $3,500,000 (Rec., 13358 *et seq.*); but it was realized that in the actual execution of the work, many things originally thought necessary might not be required, and many things might be required which were not originally thought necessary, so the engineer was authorized to make such changes as he might find necessary as the work progressed, the project expressly stating as follows:

> *"For the successful accomplishment of this improvement, great freedom of action should be allowed the local engineer; the necessity for the various works, and their execution, being accompanied and guided by continued careful investigations of the influence exercised by the completed portions."* (Rec., 13359.)

Captain Carter testified:

> "Prior to the beginning of the scheme of improvement by works of contraction, dredging had been done with very unsatisfactory results. The channel dredged in one year filled up before the next appropriation became available. * * * The system of spur dams was carried forward, * * * and it became necessary, in carrying on the improvements, to connect the ends of those spurs by training walls, so that the river might be regularized, or practically canalized. * * * I had a careful survey of the harbor made for the purpose of determining where these training walls should go, how far apart they should be, to what height they should be raised—as near as you could tell anything of that kind in advance—and then we started forward on this scheme of improvement with the hope of getting 26 feet at mean high water. *My object was to carry forward the contraction works as rapidly as possible, in order that I might gain what scour I could from them, and thus lessen the amount of dredging. What would not scour out by itself, I could dredge out; but I didn't want to start in and dredge out what would go out by itself as soon as I had these contracting works constructed.* Some very interesting things took place. For instance, at dams Nos. 26 and

33, we had, as I remember, 12 feet at mean low water at that crossing, which was known as the Long Island Crossing. When those dams were constructed, it scoured out in a very short time to 16 feet at mean low water, a gain of 4 feet on the low water depth. * * * When I left, an examination showed very little, if any, shoaling in the river except at the upper part. All the rest of it, in most cases, had deepened beyond that obtained by dredging, showing the beneficial results of the works of contraction. * * * The difficulties in doing this work are very great, because you have to watch the work constantly, with your finger on the pulse of the river continually, or a work that you put in one day may be wiped right out before the next day by the force which you are struggling to control; and it is absolutely necessary in work of this kind that the greatest care be taken not to let the river get any start of you. If you put in a wall and it starts to scour underneath, you don't know when you can stop it; it has got to be foreseen and stopped before the scour amounts to anything." (Rec., 3695-97.)

Under the project, it became the duty of the engineer to do as much jetty work and as little dredging as possible; and when a method was devised by which the jetties could be built so as to save the government large sums of money, as when the use of mats in multiple was discovered, it became the duty of the engineer to increase the jetty work, and diminish the dredging, just as provided in the project, and set forth above.

Captain Carter testifies about the use of mattresses:

"Q. What in your opinion, would have been the result, had you tried in Savannah River or Savannah Harbor to use single brush mattresses, loading each mattress with its load of stone as it went down?

A. I told you yesterday I found my work sinking here at what is known as the Lower Flats Training Wall, and my experience there and other places on the river left me with very great alarm lest I should not be able to complete the improvement within my estimate; because if I had not been able to do something to stop that compression or settlement, I never would have got further down with the appropriation than Fort Pulaski, if I got that far; and I don't believe that it would have been possible to have completed this work within less than probably a million or two dollars more than the estimates, if the original method of

sinking those mattresses had been adhered to." (Rec., 3643-44.)

The result was that the project of obtaining a navigable depth of 26 feet at mean high water from Savannah to the sea was completed within the estimated cost, which would not have been possible had the original ideas of what work might be necessary been followed blindly, as the government now insists ought to have been done.

When a man attempts to secure a certain result by engineering methods, he figures out all the things he thinks may be necessary to accomplish that result, but *the result itself* is the object of the project, and he might or might not do all of those auxiliary things; but so long as he can accomplish *the end sought within what he originally estimated it would cost*, he has successfully completed that project within the estimates; whether or not he requires done each individual thing he thought might be necessary at the time he made his estimates, has nothing whatever to do with the case, from an engineering standpoint. (Rec., 8728.)

As said by Lyman E. Cooley, a prominent civil engineer of Chicago, in his testimony in this case:

> *"The object to be accomplished, as in a war or a battle, is the thing. * * * The instrumentalities are subordinate."* (Rec., 8562.)

Other witnesses testified in favor of Carter's manner of doing that work, among whom are: Gen. William Ludlow, Col. T. H. Handbury, Col. Wm. L. Marshall, Col. Jos. H. Willard, Col. Wm. T. Rossell, Maj. F. A. Mahan, Maj. C. McD. Townsend, Maj. Thos. H. Rees, all engineer officers of the United States Army.

For further details, see (Rec., 7991-92; 7995-96; 8206-07; 8263-65; 8385-86; 8724; 8734.)

—E—

Attacks Upon the Work.

There is no pretense, in Johnson's Exhibit 319, that Westcott received any money from Greene and Gaynor, in alleged "Divisions" 1, 2, 3 or 4.

In "Division" 5, it appears that on April 14, 1893, B. D. Greene cashed his own check for $6,550; John F. Gaynor gave a check to some one for $8,450; and Robert F. Westcott deposited $14,500.

Westcott's bank account shows that he was in the habit of making "hundreds of thousands of deposits" (Rec., 7753), and there is no indication that the money Westcott deposited came from Greene and Gaynor.

Concerning a similar alleged coincidence, CHARLES MCPHERSON testifies:

"Q. In a great city like New York, where vast sums of money are handled every day, would the fact that a check by one man for $12,075 was paid, and the fact that another man deposited $11,000 on the same day, both men handling as the evidence shows vast amounts of money, be any indication, standing alone, to show that the $11,000 was a part of the $12,075?

A. It would not.

Q. What would be the chances in a great city like New York, where both parties were handling large amounts of money, what would be the chances of the $12,075 check of one man being the same money as the $11,000 deposited by another man?

A. I could not say exactly what the chances would be, but they are too remote for speculation, perhaps one chance in several thousand or millions.

Q. Such a coincidence—or you could scarcely call it a coincidence,—such a payment by one man and deposit by another man would scarcely be a clew, would it, to an expert accountant endeavoring to trace out where a fund went to or came from?

A. It might be used as a clew for the purpose of investigating, but no more than that.

Q. But if you started on such a clew as that and got no further information or knowledge on the subject, you would consider it too remote to be worth considering, would you not?

A. Yes, sir." (Rec., 6831-6832.)

Johnson's claim in the next "Division" (No. 6) is where he (Johnson) gives the false deposit of $11,500. (See Defendant's Request, No. 27a.)

In "Division" 7, Westcott deposited on June 7, 1893, $12,500 and Greene's check for $12,500 was not cashed until June 17, 1893; hence what Westcott deposited on June 7 could not have come out of a check which was not cashed until 10 days later.

In "Division" 8, it appears that on July 11, 1893, W. T. Gaynor (a brother of John F. Gaynor) cashed his own check

for $36,075, and on the same day Westcott deposited $34,500; but this alleged coincidence is too weak to amount to anything, as Westcott was handling large amounts of money, which were admittedly his own.

In "Division" 9 comes the first tangible coincidence connecting Westcott with Greene and Gaynor. This is where W. T. Gaynor, on August 7, 1893, cashed his own check for $13,075, and two days later Westcott deposited $13,000.

For evidence that Anson M. Bangs, a former partner of Greene and Gaynor, had a contract for more than $1,000,000 of work in the spring of 1893, and was obliged to get an extension of time on his contract, see (Rec., 8407-08).

For evidence that Gillette knew nothing about the Savannah work (and that his testimony is therefore mere "opinion"); that he had never had any experience in similar work, etc.; see Gillette's own testimony, which is quoted in the Wyman record, (Rec., 8149-52), and which is originally found in the court martial record (Rec., 1122-1123, 1135, 4177, 4179).

For evidence showing that all witnesses against the work, who testified to anything of importance, were employes, etc., of Gillette see (Rec., 8231).

That Hains, Black, Abbot and Gaillard testified to nothing of importance against the work, see (Rec., 8156-61).

The testimony of Hains and Gaillard has not even been offered in evidence in this case by the complainant.

The "big contract" is Complainant's Exhibit 78, and it is a written order signed by Gen. Casey, Chief of Engineers, ordering Carter to buy brush mattresses at 95 cents per *square yard* from Greene and Gaynor.

For the testimony of the numerous military and civil engineers in favor of the work done under the big contract, see References herein Nos. 7, 9, 11, 13, 14, 16, etc.

As to the prices for brush mattresses, and as to the contract let through Major Stanton, see Reference herein No. 17.

For evidence that General Casey died before the charges were made against Carter, see (Rec., 905).

—F—

THE COURT MARTIAL.

For evidence that Westcott refused to testify in Carter's behalf and fled to Europe, see bill of complaint (Rec., 36).

For the decision of Judge Edmunds, see (Rec., 8988).

The testimony of Carter, Greene and Gaynor that Carter never received a penny from Greene and Gaynor, either directly or indirectly, is as follows:

OBERLIN M. CARTER testifies:

"Q. Did you ever receive a single penny of money which you supposed or believed or had reason to suspect ever came from any contractor under the government?

A. I did not." (Rec., 5859.)

"Q. Did you ever knowingly receive, directly or indirectly, from Greene or Gaynor, or any other contractor under your charge, a penny of money for any purpose whatever?

A. No, sir." (Rec., 8109.)

Carter testifies to the same effect over and over again.

B. D. GREENE testifies:

"Q. Have you ever rendered any business service for Captain Carter for which you have received money as compensation?

A. I have not. I don't understand the question exactly; have I rendered a service for Captain Carter?

Q. Any business service for Captain Carter for which you have received moneyed compensation?

A. I have not; certainly not.

Q. Has he ever rendered you any business service for which he has received moneyed compensation?

A. He has not.

Q. Have you ever been engaged with Captain Carter in any enterprise from which you have mutually profited?

A. Never.

Q. Have you ever been interested in any of the Government contracts for the improvement of Savannah River, Cumberland Sound, or any other river or harbor under Captain Carter?

A. I have.

Q. Have you ever shared with Captain Carter any of the profits arising from those contracts?

A. I have not.

Q. Have you ever placed in the hands of any person, or any bank, moneys designed for the use or benefit of Captain Carter?

A. I have not.

Q. Have you ever made any investments for the benefit of Captain Carter?

A. I have not.

Q. Have you ever bought any stocks, bonds, or made any loans to Captain Carter?

A. Made loans to him or for him?

Q. For him?

A. I have not.

Q. Have you ever made any loans to him?

A. I think I loaned him some money a number of years ago, or to his brother at his request. At the time, however, I had no contracts with the Government. The loan was paid not long after. I don't remember much about it.

Q. Have you ever had any business relations with Captain Carter which placed you under any obligations to him, or placed him under any obligations to you?

A. None whatever.

Q. Do you know of any person having an interest in these contracts who has ever given to Captain Carter for his use or benefit any money derived from these contracts?

A. I do not.

Q. Do you know of any person having any interest in these contracts who has placed in a bank, or in the hands of a third person, for the use or benefit of Captain Carter, any funds or investments?

A. I do not.

Q. Do you believe that Captain Carter has ever derived any personal profit from any of these contracts?

A. I do not." (Rec., 881-883.)

"Q. I ask you now if in any way, you, or the Atlantic Contracting Company, or Anson M. Bangs, or John F. Gaynor, or Edward H. Gaynor, or William T. Gaynor, or any concern, co-partnership, corporation, or business connections of yours, ever in any way, shape, form or manner, directly or indirectly, paid or caused to be paid to, or for the interest of Captain O. M. Carter, any moneys derived by you or any of your business associates, from the work done in this engineering district?

A. No, never." (Rec., 3571-3572.)

"Q. Have you ever in any way, shape, manner or form, been associated in any way in any business enterprise, directly or indirectly, with Captain Carter, or with anybody for or in his behalf?

A. I have not.

Q. I desire to make my question the most comprehensive question possible with respect to the accused here on trial; I desire to know from you, without any mental reservation, and as broadly as you can make the statement, whether or not you have ever paid to Captain Carter one single dollar of the money derived by you from the United States in consideration of any services performed by him in your behalf?

A. I have not.

Q. Or in any other way?

A. Or in any other way.

Q. In any other business?

A. In any other business.

Q. Or money derived from any other source?

A. Or any other source.

Q. Or to anybody directly or indirectly for Captain Carter, or for his benefit?

A. Nor to anybody, directly or indirectly, for him or for his benefit, nobody.

Q. Has the Atlantic Contracting Company ever paid any money in any way suggested by any of the questions which I have heretofore propounded to you?

A. It has not.

Q. Or John F. Gaynor?

A. Not to my knowledge.

Q. Or William T. Gaynor, as associated with you?

A. They have not.

Q. If any of the persons, John F. Gaynor, Wm. T. Gaynor, Anson M. Bangs, the Atlantic Contracting Company, engaged in the conduct of public improvements in this district, had paid any money directly or indirectly in the manner and form as I have put the questions to you, would you know it?

A. I would know it.

Q. Has any such money been paid?

A. It has not." (Rec., 3571-3572.)

JOHN F. GAYNOR testifies:

"Q. Have you ever been interested in any civil enterprice, apart from Government enterprises, in which Captain Carter was interested?

A. Never in my life.

Q. Have you ever made any investments in which Captain Carter was mutually interested with you?

A. Never in my life,—not a dollar.

Q. Do you know of any investment that Captain Carter has down there?

A. I do not. I don't know whether he has got a dollar down there or not. I am not very much in Savannah,—probably don't go there twice a year.

Q. Do you know whether it was generally understood that Captain Carter was a man of means, or not?

A. I understand that he had plenty of money after he got married. I don't think he had much before that. After he got married, I understood that Mr. Westcott was very good to him." (Rec., 935-36.)

"Q. (By Captain Carter.) If anybody besides yourself and Captain Greene had had any interest whatever in any way in the Atlantic Contracting Company, would you have known of it?

A. I should think so; certainly I would.

Q. I want to ask you this; whether directly or indirectly, to me or any one for me, in any way whatever, has anything either from the Atlantic Contracting Company or anything in which you have ever been engaged, ever been given to me?

A. No, sir. I can answer that positively." (Rec., 938-939.)

For evidence that Carter did in fact receive the securities, etc., from his father-in-law, Robert F. Westcott, see the testimony of Stimson, in Reference herein No. 25, and see the original receipts Carter gave to Westcott, which are Complainant's Exhibits 269 and 272, and which are admitted by both sides to be genuine.

—G—

HOW PLANS AND SPECIFICATIONS WERE PREPARED.

(a)

All work done by Greene and Gaynor was by contract, on plans and detailed specifications. (Rec., 8004-05.)

(b)

In the Engineer Department, contracts are simply agreements to do certain work according to certain plans at certain prices.

The contract itself recites that the work shall be done:

"in conformity with the advertisement and specifications hereunto attached, and which form a part of this contract." (Ex. 78; Form 19.) (See, also, Rec., 8018-19.)

(c)

The local engineer, when so ordered, submits his ideas for the plans and specifications for the work to be done, to his superiors. (Rec., 8003-05.)

(d)

The United States is divided into several engineering divisions, the engineer in charge of each of which is an officer of high rank. The division in which Captain Carter's district lay was the Southeast Division, the headquarters being at Baltimore, and the officer in charge being a Colonel of Engineers.

All engineering papers, passing between Captain Carter, who was the local engineer, and the Chief of Engineers, passed through the hands of the Division Engineer, the regulations (Def. Ex. 131) prescribing that he shall be the officer:

"Through whom all matters connected with engineering plan, project and construction shall be submitted by District officers, and through whom the orders of the Chief of Engineers upon the same subjects shall be communicated." (§ 27 Eng. Regs.)

Those regulations further prescribe:

"The Division Engineers will exercise care and oversight over the engineering works of officers within their divisions; will inspect the works at least once a year; will counsel, advise, and in case of emergency direct the district officer in matters pertaining to the engineering works in his charge." (§ 28 Eng. Regs.) (Rec., 8004.)

(e)

General W. P. Craighill, Chief of Engineers, testifies as to the duties of the Division Engineer:

"A. * * * The first thing is the project of improvement. That was for the Division Engineer to consider

carefully. The next was for the plan to be adopted in the execution of that project." (Rec., 3420.)

After the Division Engineer has considered and amended the plans and specifications, suggested by the local engineer, he forwards them (as amended) to the Chief of Engineers, who is in entire charge of the matter. (Rec., 8001-02, 8288-89.)

The Act of Congress of July 13, 1892, appropriating the money for the work under the big contract, expressly provided that the work should be done:

"*under the direction of the Secretary of War and the supervision of the Chief of Engineers.*"

The Statutes at Large provide that the Chief of Engineers shall have at Washington all necessary assistance to see that all plans, specifications, bids, contracts, etc., are fully considered and examined and that they are properly made and executed. Those statutes provide as follows:

"The services of skilled draftsmen, civil engineers, and such other services as the Secretary of War may deem necessary, may be employed in the office of the Chief of Engineers to carry into effect the various appropriations for rivers and harbors." (§ 122 Stat. L. 240.)

The official Army Regulations, promulgated by the Secretary of War, provide that:

"The Chief of Engineers shall have his headquarters at the seat of Government, and shall be charged under the direction of the Secretary of War, with the command of the Engineer Department including its Bureau, and with the regulation of the duties of the officers and troops of the Corps of Engineers." (Army Regs. § 1684; Eng. Regs. § 2.)

The Supreme Court of the United States has held that the Chief of Engineers has charge of the works of river and harbor improvement, by stating that:

"The operations of the Government in this regard have been conducted by the Bureau of Engineering, as part of the War Department, to which Congress has confided the execution of its wishes in all these matters." (*Wisconsin* v. *Duluth*, 96 U. S., 379.)

(f)

After receiving suggestions from local engineers (such as Carter) and from Division Engineers (such as Hains), the Chief of Engineers, with his assistants at Washington, then makes and publishes the official plans and specifications for

the work. For details as to the big contract, see (Rec., 8000-01, 8288-89, 8293.)

J. W. O. STERLY testifies, as a witness for the Government, concerning the action of the Chief of Engineers, in changing the plans and specifications for the work under the big contract, as follows:

"Q. Were they approved by the Chief of Engineers?

A. Yes, sir.

Q. Were they subsequently modified by the Chief of Engineers?

A. By the Chief of Engineers?

Q. Or by his direction?

A. By his direction; yes, sir." (Rec., 11194.)

The Chief of Engineers expressly says, in some of the cases in issue in this suit, that he changed the plans and specifications proposed by the local engineer, stating as follows in regard to the 1896 contracts:

"Amendment to the specifications has been made in this office." (Rec., 11203.)

(g)

After the Chief of Engineers had decided upon the kind of plans and specifications he wanted for the work to be done, he approved those plans and specifications in writing, thus making them official. He then issued them, and henceforth they governed in every particular. (Rec., 8005, 8289.)

The Regulations for the Engineer Department, promulgated by the Secretary of War (Def. Ex. 131), provide as follows:

"When it is intended to have any work performed, service procured or purchase made by contract, the advertisement, however made, and the specifications, must be previously submitted to the Chief of Engineers for his approval." (§ 66 Eng. Regs.)

"When plans of any kind for public work under the Engineer Department have been sanctioned by the Secretary of War or by the Chief of Engineers, they must not be departed from in any particular without the express permission of the Secretary of War or of the Chief of Engineers." (§ 11 Eng. Regs.)

(h)

The plans and specifications for the big contract were approved by the Chief of Engineers August 20, 1892 (Rec., 1467),

and no complaint was ever made against them by anybody until Gillette attacked them in the fall of 1897. (Rec., 8290, 8315.)

The first time any complaint was ever made against the plans and specifications, or the work done under the direction of Captain Carter, was in the fall of 1897, nearly two years after the work under the big contract had been successfully completed. (Rec., 8242.)

(i)

The Act of Congress of July 13, 1892, appropriating the money for the big contract, as well as other acts appropriating other moneys for similar purposes, all provided that the work should be done:

> "under the direction of the Secretary of War and the supervision of the Chief of Engineers" (27 Stat. L.; Chap. 158);

and we have seen under headings (e), (f) and (g) herein, that the Chief of Engineers is in entire charge of all river and harbor work, and that his action, and that of the Secretary of War, are final.

The courts will not review the action of the Chief of Engineers, who is the head of an Executive Department of the Government, when there is no fraud charged against him.

(j)

The preparation of plans and specifications for works of river and harbor improvement requires great technical knowledge, as well as great experience in such work, since those plans involve, as testified to by Gen. William Ludlow, Corps of Engineers:

> "all the abstract laws of hydraulics, most of which are down out of sight, and of which he (the engineer) knows the force and difficulties." (Rec., 3009.)

Such plans and specifications, hence, must be prepared by experts, and so the Chief of Engineers is charged by law with that duty, and there can be no presumption that he failed to give the plans and specifications full and careful consideration before issuing them.

(k)

The plans and specifications for all contract work done under the supervision of Captain Carter were always approved in writing by the Chief of Engineers. (Rec., 8289.)

The testimony shows that the official plans and specifications were always approved by the Chief of Engineers long before any contracts were made. For example, those for the big contract were approved in writing by the Chief of Engineers, first on July 20, 1892, and then again on August 20, 1892 (Rec., 1458), and the contract with Greene and Gaynor, under those specifications, was not approved until November 9, 1892. (Ex. 78.) The plans and specifications for the Cumberland Sound work of 1892 were approved by the Chief of Engineers July 20, 1892 (Rec., 1459), and the contract with Greene and Gaynor, for work under them, was not approved until September 27, 1892. (Ex. 84.) The same is true of all other contracts.

(l)

The Chief of Engineers was authorized to make any specifications he chose for any work, hence he must have been authorized to change any plans prepared under his orders by his subordinates. In some instances the Chief of Engineers, or the Secretary of War, expressly stated that changes had been made in the plans submitted by the local engineer. Concerning the contract of 1890, for work at Savannah, the Secretary of War changed the proposed specifications, saying, "Approved *as amended.*" (Rec., 11186.) *In the case of the big contract, the Chief of Engineers said "Respectfully submitted to the Secretary of War, with recommendation that these specifications be approved."* The same day, the second endorsement read *"The specifications are approved,"* "By order of the Secretary of War, John Tweedale, Chief Clerk"; and the same day, the third endorsement read "Approved *as amended,*" "L. A. Grant, Acting Secretary of War." (Rec., 1494-1495.) In 1896, the Chief of Engineers changed the proposed specifications, saying *"Amendment to the specifications has been made in this office."* (Rec., 11203.)

—H—

How Advertisements Were Published and Contracts Awarded.

The proposed advertisement for the big contract, the list of newspapers in which Carter was ordered to insert it, and the written order of the Chief of Engineers directing Carter to publish it are to be found in the court martial record. (Rec., 1459-1465.)

That all advertisements were published on the dates and in the newspapers directed by the War Department, see Reference herein No. 3.

For the evidence as to the bidding, etc., see Reference herein No. 2.

For evidence that the award of the contract was made by the Chief of Engineers, and that he directed the prices to be paid, see Reference herein No. 2; see also (Rec., 1476).

For evidence that the bid of a "failing bidder" may not be considered, see (Ex. 78; Sec. 23).

The only instance of the rejection of the bid of a "failing bidder" in the cases in issue, is that of one D. V. Howell, who bid on the harbor work at Brunswick in 1889, and whose bid was rejected by the Chief of Engineers, principally because he had failed in a contract at Savannah in 1879. (Rec., 13244.)

The letter of General Q. A. Gillmore, Corps of Engineers, stating that Howell "has failed to carry out" his contract at Savannah is copied in the court martial record. (Rec., 3121-3122.)

For evidence that a contract is not binding until signed by the Chief of Engineers, see the contract itself, Complainant's Exhibit 78.

For further details, see (Rec., 8005-08, 8075-79).

—1—

GREENE AND GAYNOR'S PROFITS.

Complainant's solicitor asserts that Greene and Gaynor made enormous profits out of the United States, through their contracts in the Savannah District, and he then claims this assertion to be proof that the Government was defrauded by them.

This assertion of complainant's solicitor is not only unsupported by evidence, but it is in direct conflict with the evidence adduced by the complainant itself, because that evidence proves conclusively that Greene and Gaynor made their large profits by oppressing the poor people of Georgia, and that they did not make those profits as the result of any fraud upon the Government.

It has been proved by overwhelming evidence that all contracts awarded to Greene and Gaynor were awarded to them because they were the lowest bidders in open competition therefor (Ref., 2); that all of said contracts were awarded

to them at the usual market prices of the materials and labor furnished by them (Ref. 17); and it has also been proven conclusively that Captain Carter required Greene and Gaynor to furnish much more material than their contracts called for, and that all of those materials were of the character required under those contracts (Refs. 7; 9; 11; 13; 14; 16 and 17). This proves conclusively that the United States was not defrauded.

In view of these facts, and of the aforesaid claim made by the complainant's solicitor, the way in which Greene and Gaynor really did make their profits will now be shown in the following memoranda, based upon the evidence of the complainant, as taken from the official record in this case.

MEMORANDA.

The money which is held by the court is said by the complainant to have come from certain contracts, between Greene and Gaynor and the United States, as follows:

#4820	C. S.	Sep. 16, 1892	$ 162,245.88
#4960	S. H.	Oct. 22, 1892	2,110,869.46
#5127	D. H.	Dec. 20, 1892	23,433.98
#5133	A. R.	Dec. 20, 1892	11,840.95
#5253	J. C.	Mar. 1, 1893	21,495.78
#5254	B. H.	Mar. 20, 1893	16,426.93
#5811	C. S.	Nov. 15, 1894	159,097.10
#6049	D. H.	Apr. 20, 1895	45,590.13
		Total	$2,551,000.21

(Ex. 216; 319.)

The complainant alleges that Greene and Gaynor paid for the labor and materials to perform said contracts the sum of only $763,491.16, leaving a net profit to them of $1,787,509.05. (Rec., 22.)

This alleged profit of $1,787,509.05 (plus some alleged profits on other contracts let in 1896) is what is meant by the $2,000,000 of "gigantic frauds" which the complainant charges were perpetrated on the United States by Greene and Gaynor. (Rec., 18.)

Those alleged profits are based entirely on the guess-work of Edward I. Johnson, as there is no evidence in the record which proves how much Greene and Gaynor paid out for doing their work in the Savannah District. (Rec., 8453.)

Inasmuch as there is no proof in the record, and as Carter has no means of knowing how much Greene and Gaynor did

in fact pay for their labor and materials, it will be assumed for the present to be as above stated by the complainant's solicitor; and, without admitting that Greene and Gaynor really did in fact make said alleged profits of $1,787,509.05, and that the total amount paid out by them in performing said contracts was only the difference between the $2,551,000.21 which they received, and those alleged profits of $1,787,509.05; *i. e.*, $763,491.16,—the principal question before this court is then as follows:

Did Greene and Gaynor make said excessive profits by obtaining said contracts at too high prices? or,

Did Greene and Gaynor make said excessive profits by doing poor work or work inferior to that called for by the contracts?

If Greene and Gaynor made their excessive profits by either or both of the above methods, then they "robbed" the United States.

If, on the contrary, it appears (as it does by the most overwhelming evidence), that said contracts were honestly let, at fair and usual prices, and that they were more than honestly performed, and that the work done was a great and lasting success, then we must look elsewhere for an explanation of those alleged excessive profits, and the explanation is easy to find, and cannot be disputed by the complainant, because it is found in a multitude of evidence furnished by the complainant itself.

If Greene and Gaynor "robbed" anybody in making said excessive profits, they did not rob the United States, but they robbed the poor people of Georgia, and obtained from them for $763,491.16, labor and materials which were worth several times that amount, even in the State of Georgia.

The evidence shows that substantially all the cost to Greene and Gaynor, in performing said contracts, was for labor (mostly performed by the poor people of Georgia and vicinity), and for brush and logs (obtained from the same people).

The evidence shows that Greene and Gaynor paid to the people of George, for materials and labor, as follows:

For brush enough to make a $4,400 brush-log mattress, *i. e.*, 4,000 square yards of brush mattress containing about 2,700 cubic yards of brush fascines (Rec., 8086), they never paid more than from $5 to $10 per mattress, as shown by the following evidence of the complainant:

O. G. Darling, a witness for the complainant, testifies:

"Q. Did the Gaynors get any brush off your place?

A. Yes, sir.

Q. What did they pay you for that brush?

A. Five dollars per mat; what brush would make a mattress, they paid $5 for." (Rec., 4448.)

"Q. Whatever number of courses it took did not make any difference?

A. We were not confined to any number of courses at all; it was the completed mattress." (Rec., 4448.)

A. S. Cooper, a witness for the complainant, testifies concerning the cost of brush *and poles* under the 1892 contract at Savannah as follows:

"A. For every mat, then, the privilege of cutting the brush per mat—brush *and poles*—would be $5." * * *

"The cost for 2,000 yards of mat." (Rec., 1176.)

In many instances Greene and Gaynor paid nothing at all for brush, as shown by the following evidence of the complainant:

Philip Hopper, a witness for the complainant, testifies:

"Q. Did you have anything to do with the furnishing of brush used by the Atlantic Contracting Company in 1897?

A. Only in this way; my father owns some land over there, and they got the privilege to cut the brush." (Rec., 4432.)

"Q. Did they have to pay anything for the brush material gotten from your father's place?

A. No, sir." (Rec., 4433.)

Frank DuBois, a witness for the complainant, testifies:

"Q. Did you work any for the Atlantic Contracting Company?

A. Yes, sir; a short while; about three weeks I suppose." (Rec., 4444.)

"Q. Did you make any bundles of brush?

A. That is the work I did, was to make bundles.

Q. What place did you get the brush from?

A. I got it off my land.

Q. You charged them anything for the brush?

A. No, sir." (Rec., 4444.)

For cutting brush and carrying it to a rack, and then manufacturing it into brush logs, fifteen feet long and nine inches in diameter where tied (after compression by levers, Greene

and Gaynor paid in general the nominal price of from about 42c to 60c per day, less the charge for board at Greene and Gaynor's boarding house (Wy. 3709), as shown by the following evidence of the complainant:

ANSON SMALL, a witness for the complainant, testifies:

"Q. What kind of work were you doing?

A. I was working tying brush." (Rec., 1933.)

"Q. How many of you did it take to make one?

A. Three of us; three of us worked together to a bench.

Q. How much did you get a piece?

A. 2½c apiece." (Rec., 1933.)

"Q. Did each man get 2½c, or all three of you?

A. Yes, sir; 2½c to the bundle; that is, we made 50 bundles for a day's work." (Rec., 1935.)

"Q. And there was $1.25 to divide among the three of you?

A. Yes, sir; that is, for fifty bundles." (Rec., 1933.)

A. M. MILLER, a witness for the complainant, testifies:

"Q. How many did it take to work on a bundle at one time?

A. Two at the bench, and one chopping brush.

Q. How many bundles did you make in a day?

A. They allowed you to make 50 bundles, and if you made more than that, of course they would pay you extra; but we never made more than 50 bundles.

Q. Did you get more than 2½c apiece for them at any time?

A. Not to my recolection I didn't; they paid 2½c." (Rec., 1937.)

ROYAL SAWYER, a witness for the complainant, testifies:

"Q. You worked for Mr. Gaynor from 1883 to 1894?

A. Yes, sir." (Rec., 1797.)

"Q. What kind of work were you doing?

A. Tying brush bundles.

Q. What kind of brush bundles?

A. Fifteen feet long." (Rec., 1794.)

The Witness: "The highest we got was 60c a day." (Rec., 1797.)

RUFUS HABERSHAM, a witness for the complainant, testifies:

"Q. Where were you at work in 1893 and 1894?

A. Working for Mr. Gaynor." (Rec., 1813.)

"Q. Did you ever work at the same business after 1895?

A. Yes, sir. * * * The same foreman, Ned Burke." (Rec., 1814.)

"Q. How much did you receive then?

A. Received 60c a day then." (Rec., 1814.)

"Q. You were one of a team of three men?

A. Yes, sir." (Rec., 1814.)

ELISHA WINTER, a witness for the complainant, testifies:

"A. Ned Burke was supposed to be our foreman." (Rec., 1805.)

The Witness: "I had to cut enough to make 50 bundles, or didn't get paid for the day's work." (Rec., 1803.)

The Witness: "I only got paid at the rate of whatever the bundles accepted would come to, at 60c a day." (Rec., 1803.)

EDWARD BURKE, a witness for the complainant, testifies:

"Q. Were you a foreman there?

A. Yes, sir.

Q. How many men were employed there?

A. I was running up to about seventy, some days.

Q. How much were the men paid that year for their labor?

A. In 1894, 60c a day for 50 bundles." (Rec., 1808.)

"Q. How many men did it take to make a bundle?

A. Three.

Q. What was their different work?

A. Two men to the bench, and one chopping." (Rec., 1807.)

"A. Last year * * * he was paying them at the rate of 3c a bundle.

Q. He wasn't paying them by the day then?

A. No, sir; 3c a bundle." (Rec., 1808.)

A. S. COOPER, a witness for the complainant, who testifies concerning "the cost of running the jetty works on Savannah Harbor during the heaviest work" on the 1892 contract, and who further testifies that "many of these items I personally know to be right," testifies:

"Mat camps * * * men at 50 cents." (B. E. Ex. 71.)

The evidence of the complainant further shows that although Greene and Gaynor paid nominal prices of only from about 42c to 60c a day for their labor, as has just been shown,

they pitilessly oppressed their poor employes by arbitrarily rejecting from about one-tenth to all—or, say an average of about one-third—of the brush logs those laborers made. Those rejected brush logs were condemned by Greene and Gaynor's foremen, and were not paid for, although they were well made, and were actually used in the work, as shown by the following evidence of the complainant:

ROYAL SAWYER, a witness for the complainant, testifies:

"A. If we made 50 bundles, and they docked us and took away 10 or 15 bundles, they didn't pay us for that." (Rec., 1796.)

"Q. What became of those rejected bundles?

A. Hauled them down and put them in the mattresses the same as the others." (Rec., 1796.)

"Q. What did those things look like which they rejected on you?

A. One was no better than the other, but they took the money away from us, and we had to do the best we could. * * *" (Rec., 1797.)

"Q. And you were doing the best you could to earn your money, and sometimes they threw out bundles and took your money away from you?

A. Yes, sir." (Rec., 1798.)

RUFUS HABERSHAM, a witness for the complainant, testifies:

"A. I made 50 bundles every day, and then I didn't get paid because some of the bundles were rejected; these bundles that were rejected, I didn't get no pay for.

Q. How many bundles were rejected on your work?

A. I have had a whole day's work rejected, and was authorized to come back the next day to over-work them,—cut them loose and repair them over,—and when I went back the next morning, they was all gone. (Rec., 1814.)

"Q. And those that they threw out were just as good as those they took, as far as you could see?

A. As far as I could see; I did just as hard work on them.

Q. And one day they threw out your whole day's work?

A. Yes, sir.

Q. And told you you would have to make them over, but when you got back, they had carried them off?

A. Yes, sir.

Q. But they were done just as well as the others?

A. Yes, sir." (Rec., 1816.)

ELISHA WINTER, a witness for the complainant, testifies:

"Q. Did you see many bundles rejected?

A. Yes, sir; there wan't a day but what four or five, up to a third of them, would be throwed away." (Rec., 1803.)

"Q. Those bundles that they took away and said you hadn't done good work on were just as good as those they did pay you for, weren't they?

A. They said not, but they used them.

Q. Didn't they seem to you to be just as good as the others?

A. Yes, sir.

Q. You saw no difference in them?

A. The only difference I saw was that I didn't get paid for them; I lost a square day's work once. I had a contest with my foreman about it, but I had to lose it just the same." (Rec., 1805.)

The arbitrary rejections made by Greene and Gaynor, which have just been shown, actually left laborers who were being paid nominal wages of from 42c to 60c per day, perhaps not more than two-thirds of that amount, *i. e.*, from 30c to 40c per day.

But Greene and Gaynor were not content to oppress the poor laborers who worked for them in the manner just shown, for the evidence shows *they had established a sort of "peonage" system,* and through arbitrary rejections, board bills, etc., *they actually paid laborers (who were nominally getting 60c a day) only* $1 *a week, or about* 17*c a day,* as shown by the following evidence of the complainant:

HECTOR KINLAW, a witness for the complainant, testifies:

"Q. Who were you working for?

A. Working for Mr. Walsh and Mr. Gaynor." (Rec., 1933.)

"Q. Making what they call fascines?

A. Yes, sir.

Q. How much did you get apiece for them?

A. 3½ cents." (Rec., 1933.)

"Q. How many bundles did you make in a day?

A. Well, sir; called 50 bundles a day's work." (Rec., 1933.)

"Q. How many men were helping you; how many were there together?

A. Three." (Rec., 1933.)

The price of 3½c per fascine, when three men were making 50 fascines per day, gave $1.75 to be divided among those three men for a day's work, or a nominal daily wage of a trifle over 58c per man. But the witness shows that *this nominal daily wage of about 58c per day, was reduced by Greene and Gaynor to about 17c per day,* for this same witness KINLAW testifies:

"Q. * * * How often were you paid?

A. Every two weeks." (Rec., 1933.)

"Q. How much did you get at that time? What sum of money was paid to you at the end of two weeks?

A. At the end of two weeks, we drawed two dollars apiece.

Q. Two dollars at the end of two weeks?

A. Yes, sir." (Rec., 1933.)

"Q. *Was that the most you ever received?*

A. *Yes, sir; that was the best we got.*

Q. *One dollar a week?*

A. *Yes, sir.*" (Rec., 1933.)

Of the work done by Greene and Gaynor, under the contracts hereinbefore mentioned, $1,940,000 (in round numbers) was for brush logs and brush-log mattresses, furnished by them (Ex. 175; 176; 177), which they obtained from the people of Georgia, as has been shown, for only a fraction of their real value.

Of the $763,491.16, which the complainant says was paid out by Greene and Gaynor for labor and materials under those contracts, the complainant's own figures as to the contractors' profits, etc., show that about $300,000 was for rock, and about $90,000 more was for miscellaneous labor and materials (Wy. 3642; 3566), thus leaving $373,491.16 as paid out for labor and materials in the brush logs and brush-log mattresses.

The evidence of the complainant shows that the cost of brush-log mattress work at Savannah and at Cumberland Sound is about the same as at the mouth of the St. Johns River, and at St. Augustine, Florida.

MAJOR W. M. BLACK, Corps of Engineers, a witness for the complainant, testifies:

"As to the cost of mattresses at Cumberland Sound, I can only give my opinion. I can see no reason why the cost should differ materially there from these at the mouth of the St. Johns River." (Rec., 2536.)

The evidence of the complainant shows further that the men employed in making brush logs and brush-log mattresses, at St. Augustine and at the mouth of the St. Johns River (where laborers were not oppressed by the employer), were paid 15c an hour.

MAJOR W. M. BLACK, Corps of Engineers, a witness for the complainant, testifies:

> "At the St. Johns, * * * we paid $1.50 a day labor, or 15c an hour for labor; of course, the price of labor varies." (Rec., 2561.)

MAJOR D. DUB. GAILLARD, Corps of Engineers, a witness for the complainant, testifies:

> "Cost of mats as reputed to have been built at Fernandina, Florida. * * * Labor and materials assumed prices paid at St. Augustine, Florida. * * * Labor 15c an hour." (Rec., 806.)

But the uncontradicted evidence of the complainant shows that, *while the fair and honest price of labor was* 15c *an hour, Greene and Gaynor were only paying* 17c *a day,* plus the cost to them of the board which they furnished to their laborers. There is no evidence in the record showing the cost to them of such board, but as many public institutions in this country board their inmates at a cost of about 8c a day, it is not to be presumed that Greene and Gaynor paid more than that for the board they furnished to the poor and oppressed laborers whom they employed; hence, the complainant's own evidence shows that *the actual cash outlay of Greene and Gaynor, for their labor, was about* 25c *a day, or* 2½c *an hour, which is only one-sixth of what those laborers ought to have received.*

The complainant's evidence as to mattress costs, etc., shows that about two-thirds of the total cost of brush logs and mattresses is for labor (Rec., 1176); hence two-thirds of the $373,491.16, which the complainant says is the cost of the brush logs and mattresses, was for *labor* performed by the poor people of Georgia, *i. e.,* only $250,000 was paid out for labor. If those laborers had been paid the honest price of 15c an hour, instead of the 2½c per hour they really were paid, then the cost of that labor to Greene and Gaynor would have been $1,500,000—(a difference of $1,250,000)—and Greene and Gaynor's profits would have been no more than a reasonable profit for such work and its attendant risks.

Or, in other words, Greene and Gaynor furnished $1,940,000 worth of brush logs and brush-log mattresses at a cost to them, according to the complainant, of $373,491.16.

This was done by paying practically nothing for brush, and by paying their laborers only 2½c an hour, instead of 15c an hour. Thereby they "robbed" the people of Georgia out of $1,250,000, over and above a reasonable profit on their work.

It thus appears, from the complainant's evidence, that Greene and Gaynor had contracts amounting to $2,551,000.21, on which (if they had paid their laborers the usual price of 15c an hour) they would have made a profit of $537,509.05, which was a reasonable profit for such work and the risks incident thereto.

But instead of paying their laborers 15c an hour, as others did, they only paid them one-sixth of that amount, or 2½c an hour, and thereby they made additional profits of $1,250,000, *all of which came out of the people of Georgia, and none of it was obtained by robbing the United States.*

It is no wonder, therefore, that the complainant's solicitor, Mr. Marion Erwin of Georgia, was very anxious to prosecute Greene and Gaynor for "robbing" the poor people of Georgia out of vast sums of labor and materials; and it is no wonder that Greene and Gaynor precipitately fled from a trial before a Georgia jury!

Nor is it strange that Mr. Erwin insisted upon trying Greene and Gaynor in Georgia, when they might have been indicted and tried years ago in New York, where they received most of their money.

If Greene and Gaynor had been tried anywhere except in Georgia, they could then have made their only honest and real defense, *i. e.*, that they made their excessive profits by robbing the people of Georgia, and not by robbing the United States.

Mr. Erwin, therefore, made desperate efforts to try them before a Georgia jury, and Greene and Gaynor made equally desperate efforts to avoid trial before a Georgia jury.

For Greene and Gaynor to have made an honest defense, on the ground that it was he people of Georgia they robbed out of those exorbitant profits, would have produced a verdict of "guilty" before a Georgia jury, without the jury leaving their seats. Hence Greene and Gaynor may have assumed a situation which, perhaps, they thought was easier and safer for them to take, regardless of how it affected

Captain Carter, who was not interested in their case, and who was not there to make any defense.

If, therefore, it shall appear in the present case that the contracts with Greene and Gaynor were honest contracts, honestly let at the usual prices for such work, and that they were more than honestly performed, and that the excessive profits made by Greene and Gaynor were made by robbing the people of Georgia, instead of by robbing the United States,—then the fact that Greene and Gaynor fled to Canada to avoid being tried by a Georgia jury, and the further fact that they preferred to be tried by a Georgia jury for robbing the United States, rather than for robbing the poor people of Georgia, fully meets and disposes of any moral effect which the flight of Greene and Gaynor, and their attitude in the proceedings against them, may have upon Captain Carter.

And it may be proper to suggest that Captain Carter did not flee from any Georgia jury, but on the contrary asked again and again to be tried there, and might have been tried there long ago on the same indictments and on the same charges as those made against Greene and Gaynor, if the Government had been willing to permit him to be tried there. (Ref. 51.)

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THE BIDDING.

Everybody knows that if there was any unfairness about the letting of a contract the unsuccessful bidders would be very likely to discover it; hence their testimony is of the greatest importance.

The character of the bidding for the big contract has already been shown in Request No. 2, by the testimony of Major THOMAS H. REES, Corps of Engineers, and of the unsuccessful bidders and bondsman, P. SANFORD ROSS, L. Y. SCHERMERHORN and JACOB PAULSEN. In addition thereto, reference is made to the following testimony, which shows that the bidding for work done under Captain Carter was always free and untrammeled:

JOHN L. GRIM, a competitor of Greene and Gaynor, testifies:

"Q. Was there anything different in this letting, in the opening of the bids, from what you had seen or ob-

served of other fair bids in the 100 or 200 that you had attended, or openings that you had attended?

A. No, sir.

Q. Tell us what took place whether there were few or many people at the opening, as you recall it?

A. There was right smart; I should judge there was 20 people there; may not have been quite that; 15 people I should think.

Q. And the bids were opened, yours among the others?

A. Yes, sir; the bids were laid on the table and opened right there. They were opened by a clerk and handed to Captain Carter, and I don't know who did read them now, I can't remember.

Q. Who read them out?

A. Somebody in the office, I cannot remember.

Q. Whether Carter or somebody else, you don't remember?

A. No, I do not.

Q. Was there anything there that you could see, or so far as you knew, that was unfair or showed collusion, so far as you could see?

A. No, sir; nothing at all." (Rec., 13075.)

A. R. Stewart, a competitor of Greene and Gaynor, testifies:

"Q. Were you present when the bids were opened?

A. Yes, sir.

Q. I understood you to say that you were acquainted with the other parties who bid on this work?

A. Yes, sir.

Q. Did you hear any complaints among them that there was any unfairness?

A. No, sir, I never heard a word.

Q. From any of the bidders?

A. No, sir, I never heard a word.

Q. Did you ever hear any charge of favoritism being shown, or that the specifications were drawn so that they favored one bidder more than another?

A. I never heard anything of the kind." (Rec., 653.)

C. C. Ely, a competitor of Greene and Gaynor, testifies:

"Q. Have you ever had any difficulty in getting any information from this office concerning any part of the work that you desired to be informed about?

A. No, sir.

Q. Did you, or did you not, feel that it was a fair, open competition in every way?

A. We did." (Rec., 660.)

J. W. RUTHERFORD, a competitor of Greene and Gaynor, testifies:

"Q. Now, was there any suggestion of anybody's attempting to buy off, or to get you to enter into a combination, or to prevent you from bidding at all with reference to that work?

A. Never had I had the slightest intimation from anyone whatever.

Q. Did you know any of the Gaynors?

A. Yes, sir; I knew them all." (Rec., 3159.)

"Q. Was there any suggestion made by them to you?

A. Not the slightest.

Q. That you should not bid?

A. Not an intimation.

Q. Did Captain Carter during his conversation with you seem to be anxious that you should bid on this work?

A. He seemed to be. I understood him to be.

Q. You were not in any combination with either Greene or Gaynor, or anyone else, were you?

A. No, I am not just on terms of sufficient intimacy to go into any combination with them.

Q. You are a competitor of theirs?

A. Yes, sir.

Q. Now, did you bid on this work?

A. I did not.

Q. Will you tell the court why—what was the occasion of your not bidding?

A. I went up, as I say, from Yulee to New York, to perfect my bond. The condition of the country at that time—it was just before the election, just before the presidential election—and was in a very disturbed condition. Financial men looked askance at the situation, and the gentlemen who had agreed to go on my bond, and who I had expected would do so, said they did not feel like incurring an obligation as large as that was until affairs were more settled, and consequently, not having the bond perfected, I did not bid. That is the long and short of it, the only reason I had for not bidding." (Rec., 3159-60.)

JACOB FRIDAY, who competed against Greene and Gaynor, testifies:

> "I have had specifications from you for your works, and I have been present myself, or by my representatives, at three lettings. I got all information I wanted perfectly satisfactory and everything at the letting was perfectly fair." (Rec., 995.)

JAMES A. BRYAN, a competitor of Greene and Gaynor, testifies:

> "Every bidder got all information about the works, and the specifications were clear, and understood by everybody, and everything about the letting was perfectly fair." (Rec., 1035.)

RODERICK G. ROSS, a competitor of Greene and Gaynor, for whom the witness Agnew acted as agent in 1894, testifies:

> "We were all given every bit of information, and I don't believe there was any sign of feeling or favor." (Rec., 8793.)

Every real competitor of Greene and Gaynor, as well as every independent witness at the biddings, testifies that all of the matters connected with the bidding and the award of the contracts were open and fair.

But, further than all this, the question of the award of the contracts was considered in Washington, and the awards were made there, and not by Captain Carter.

For the evidence that the contracts were awarded to the lowest responsible bidder, see (Rec., Vol. 26); and the Annual Reports of the Chief of Engineers.

For the evidence that the award of contracts was made by the Chief of Engineers, see (Rec., 1476), and the contracts themselves (Ex. 78, etc.).

GEN. W. P CRAIGHILL, Chief of Engineers, testifies concerning the prices, the award of contracts, etc.:

> "A. The situation with reference to the continuous contracts with which I had to deal as Chief of Engineers, was somewhat peculiar. Mr. Lamont, who was Secretary of War, I suppose did not approve the large expenditures that had been made by Congress in that direction. I know the President did not, because he vetoed the River and Harbor Bill; and there was a departure from the usual course in dealing with bids and with contracts in that connection. As a rule, in the or-

dinary business of the Engineer Department, when contracts are prepared and signed by the officer and the contractor, they go to the office of the Chief of Engineers; *there they are carefully examined, and they are brought to the Chief of Engineers for his approval, which is one of the requisites.* As a rule, that is the first time that the Chief of Engineers sees them; and as a rule he signs them without reading them; he has not the time really to read so many contracts—each is in quintuplicate—and they come to him by the peck. He is obliged to sign them upon the statement of his assistants that they are in proper form, and in accordance with the regulations. But with reference to these contracts, and these bids for this particular place and for Fernandina, and for all those in the early part of the letting of contracts under the continuous contract system, of which these were a part, a departure was made from the usual course. They were all taken to the Secretary of War himself, and directions were given that no approval of contracts should be made by the Chief of Engineers without the specific direction of the Secretary of War in each case.

Q. Did you have any conversation with the Secretary in regard to the approval of the 1896 contract at Fernandina and Savannah Harbor?

A. I did.

Q. Will you state whether or not you advised the letting of those two contracts?

A. I did.

Q. And the letting was approved by the Secretary?

A. Yes, and the contracts were made.

Q. Can you state the reasons which impelled you to make that recommendation to the Secretary?

A. The reasons were these; that the work was important; it is very important to continue a work of that sort, which is in progress; there was a great pressure from the commercial people who were interested in matters of that sort, that the work should go forward. They were brought more upon the Secretary than they were upon me. The Senators and others went to him directly, some came to me, but I knew of it, that there was a very great pressure to have those contracts put in force as soon as possible; and it is true with reference to others; not these alone, but others." (Rec., 3417-18.)

The Witness: *The prices in bids are all considered before the contract is approved.*" (Rec., 12220.)
For further details, see (Rec., 8011-21.)

WITHHOLDING INFORMATION.

But there is another charge against Carter in connection with the bidding.

It is contended by the complainant that when prospective bidders for the works of harbor improvement went to Captain Carter for information, he gave them different information from what he gave to Greene and Gaynor.

In other words, it is contended that Captain Carter gave full and free information to Greene and Gaynor, and that he withheld information from other bidders.

Not a scrap of evidence has been introduced by the complainant in support of such a contention; it is just *argued.*

On the other hand, it is shown, by the testimony of the men who competed against Greene and Gaynor in the Savannah District, that Captain Carter gave to all of them the information they desired, and that such information was fairly and freely given.

P. SANFORD ROSS, a contractor of long experience and a competitor of Greene and Gaynor, who bid on the work, testifies in Carter's favor:

"Q. * * * Was there any hesitancy about Captain Carter giving any information to you, that you saw?

A. Not at all.

Q. Every question you asked him about the work that was to be done, how was it?

A. He was very frank and free.

Q. Was there any idea of any suppression of any information that occurred to you?

A. No." (Rec., 12922.)

"Q. Have you ever had any difficulty whatever in obtaining all the information regarding the work?

A. None whatever.

Q. Have you ever heard of anyone who ever had any difficulty?

A. No, sir.

Q. Have you ever heard of anyone being improperly or unfairly treated with reference to that?

A. No, sir." (Rec., 845.)

C. C. ELY, the agent of P. Sanford Ross, when asked whether he knew which mattress design would be generally used, testified:

"A. It was the third design." (Rec., 659.)

W. F. MCCAULEY, an unsuccessful bidder on the big contract at Savannah in 1892, and now a witness for the Government, testified on October 6, 1897:

"That he is familiar with the work in Savannah Harbor, and in 1892 made a bid for doing of same. Deponent examined the specifications carefully, and had them explained to him by Captain Carter. Deponent understood that only the third design of brush mat would be used, those of the other designs (if any) to be very few in number. Low grade stone was to be Florida stone. Deponent knew the kind of fascines and mats used, and believes if it had been known in the beginning that the quantity of mats was to be largely increased (as it was), much higher bids would have been made for them, brush being scarce and the haul great. In deponent's judgment, it is cheaper and better in the river, *for a contractor,* to build the mats one at a time, and *not* on top of each other. The prices bid were very reasonable, and deponent *has been on the river ever since, and knows that the work has been well done, and the results very successful.*" (Rec., 1013.)

C. P. E. BURGWYN, an engineer and contractor of long experience, and a competitor of Greene and Gaynor, testifies in Carter's favor:

"A. * * * I showed him (Captain Carter) my card, and he told me that he was very busy, and he would like to have his assistant go over the maps and drawings with me, and if there was anything then that I did not understand, he would be glad to show it to me himself. * * * There was one question that was not clear in my mind at that time, and I asked the assistant about it, and he said—Captain Carter, I think, happened to be in the next room, and he came in, and he asked what that question was, and he took up himself the explanation, and *explained the matter very thoroughly and very clearly to my mind,* and he then offered me the courtesy of his boat to go on the river and examine the work, or anything of that kind." (Rec., 12933.)

"Q. Was there anything in that interview that conveyed to your mind the idea that he was suppressing any information about this work?

A. Not the slightest.

Q. Every question that you asked him was freely answered?

A. Well, more than that. Captain Carter knew that I had done similar work, and he paid me the compliment to ask my opinion of the work; he discussed it very fully.

Q. You mean your opinion as to how to carry on this work?

A. Yes.

Q. And how to execute this contract and get the result sought for?

A. Yes, sir." (Rec., 12933-34.)

L. Y. Schermerhorn, an engineer and contractor of experience, President of the American Dredging Company, and a competitor of Greene and Gaynor, testified in Carter's favor:

"Q. * * * Did you visit Savannah?

A. I did * * * for the purpose of more specifically examining the work, and determining by the necessary inquiries at the office of the engineer in charge, the details that were not clearly defined to my mind." (Rec., 12425.)

"Q. Was the information given to you?

A. It was freely and fully given me in every direction that I made inquiry." (Rec., 12425.)

"Q. Did you make such inquiries at the engineer office?

A. I did, very carefully.

Q. Of whom?

A. Of then Captain Carter.

Q. The engineer officer in charge?

A. The engineer officer in charge." (Rec., 12425.)

"Q. What, if anything, was said with reference to the designs of mattresses that was most likely to be used * * *?

A. From the best of my recollection the third design of mattress specified was that which was to be used." (Rec., 12427.)

J. W. RUTHERFORD, an engineer and contractor of long experience, and a competitor of Greene and Gaynor, testifies in Carter's favor:

"A. I went to see Captain Carter to have some matters explained that were possibly a little indefinite. I thought, and see the plans for the work, and generally discuss the situation with him as engineer in charge. He treated me very courteously, and did everything he possibly could do to facilitate the purpose of my trip; showed me the working plan of the mattresses already put in there, and elevations of what was expected to be accomplished in the construction of dykes, and the method of hearting, etc., and also discussed very fully the methods of procedure in construction." (Rec., 12874.)

"Q. Was there any question that you asked Captain Carter with reference to this work unanswered by him?

A. None whatever.

Q. Was there any information in regard to the work, or how it was to be done, or the method of doing it, volunteered by him?

A. He discussed it very freely pro and con." (Rec., 12876.)

"Q. What was done by him with reference to furnishing you information in regard to the work to be let?

A. He offered me every facility to obtain information, showing me the plans, discussing the question of construction, and in every way furthering the object I had come down for." (Rec., 3156.)

Concerning the character of the mattresses Captain Carter proposed to use, Mr. Rutherford testifies:

"The Captain informed me that the third class would be the ones very probably to be adopted, but he might want a few of the others; but the main number of mats to be used were those." (Rec., 3158.)

A. R. STEWART, a contractor of experience, and a competitor of Greene and Gaynor, testifies in Carter's favor concerning the mattresses to be used, etc.:

"A. My recollection is that you told us on specific inquiry that probably not any of the second would be used, or very few, but the most would be of number three. That was my understanding.

Q. As a matter of fact, on what basis was your bid made?

A. I think on No. 3, I think it was called in the specifications.

Q. Did you base your bid on these designs as built previously in this work?

A. We based our estimate on the work as it had been done before, and our understanding was that it would be of the same general character as what was done before." (Rec., 650-651.)

CHARLES C. ELY, a contractor of experience, and a competitor of Greene and Gaynor, testifies in Carter's favor:

"Q. Have you ever had any difficulty in getting any information from this office concerning any part of the work that you desired to be informed about?

A. No, sir.

Q. Did you, or did you not, feel that it was a fair, open competition, in every way?

A. We did." (Rec., 660.)

JAMES A. BRYAN, a contractor of long experience, and a competitor of Greene and Gaynor, testifies in Carter's favor:

"A. Deponent was at Savannah at the opening of bids in 1896. Every bidder got all information about the works, and the specifications were clear and understood by every body and everything about the letting was perfectly fair." (Rec., 1034.)

JACOB FRIDAY, the contractor who built the great jetties at Charleston, S. C., and a competitor of Greene and Gaynor, testifies in Carter's favor:

"I got all information I wanted perfectly satisfactory, and everything at the letting was perfectly fair." (Rec., 995.)

JOHN L. GRIM, a contractor of long experience, and a competitor of Greene and Gaynor, testifies in Carter's favor:

"Q. You went there as an independent bidder?

A. Yes, sir.

Q. And the bid you put in was an honest bona fide bid?

A. Yes, sir.

Q. Was there any collusion between you and any other bidder, or between you and the engineer officer?

A. None whatever.

Q. Were you furnished the information, Mr. Grim, that you asked of Captain Carter?

A. Yes, sir.

Q. Was that given grudgingly, or courteously?

A. No, sir; as much so as any engineer ever gave me on the Atlantic coast." (Rec., 13074.)

"Captain Carter gave deponent the specifications for both works in 1896 and explained them to deponent very fully. Deponent was told that only the third kind of mat would be used, except for a very few of the others, not enough to affect cost, and that it would be built and sunk as before, if the contractors could do it, several mats on top of one another at once." (Rec., 1009.)

Roderick G. Ross, a contractor of large experience, and a competitor of Greene and Gaynor, testifies in Carter's favor with respect to a bid made by him for work in the Savannah District:

"Deponent was upon the occasion of this bid given full and free information of all facts required by him. * * * Deponent fully understood how the mats were to be built and sunk before the bidding at Cumberland Sound in 1896. * * * Deponent was of opinion that third class mats were the ones intended to be used in the work." (Rec., 1019.)

"I am familiar with the work at Fernandina and understood that mattresses of the same character as formerly used were to be used again,—that is, your third design. * * * All bidders understood this point I feel sure. We were all given every bit of information, and I don't believe there was any sign of feeling or favor." (Rec., 8793.)

Jacob Paulsen, a witness for the Government, testifies concerning the time when the bids are first handed to the Engineer officer:

"A. You know, as a general thing, they (the contractors) don't put the bids in until the last minute,—until just shortly before they are going to be opened." (Rec., 2035.)

For further details, see (Rec., 8010-11; 8315-17.)

There is no evidence to the contrary.

—3—

ALLEGED SHORTNESS OF ADVERTISING.

It is conceded by the complainant that Captain Carter advertised his works as required by the statute; that he advertised as was customary in his district before he assumed charge thereof; and as he was ordered by the War Department (which was, in general, for the large contracts, from twenty-four to twenty-seven days); but it is contended that he ought to have changed the dates prescribed by the War Department, and to have advertised for thirty days, despite his orders to the contrary.

Mr. ERWIN, complainant's solicitor, says:

"We do not contend that he (Carter) had to advertise any of these contracts for 30 days by direct law, but what we charge was that he had discretion vested in him in fixing the time; and we say that in exercising that discretion he did it deliberately and purposely in a way to cut off competition." (Rec., 8282.)

The overwhelming testimony is that Captain Carter advertised properly and did not stifle competition, as will be seen from the following:

When they propose to advertise less than 30 days, some officers ask for specific dates to be approved, just as Captain Carter did, so that the War Department may assume the responsibility.

MAJOR C. MCD. TOWNSEND, Corps of Engineers, testifies:

"Q. Did you always insert your date when you requested authority?

A. Always, when I requested less than 30 days' authority." (Rec., 2967.)

Other officers take the responsibility themselves, simply notifying the Department.

GENERAL W. P. CRAIGHILL, Chief of Engineers, testifies:

"A. * * * My recollection is that when I proposed to advertise for less than 30 days that I always notified my superiors in Washington, and explained the conditions under which I proposed to do that. *I didn't ask permission, but I notified them,* * * * so that they would understand the situation, and approve or disapprove as they thought proper. (Rec., 3426-27.)

The date to be borne by the specifications must be that approved by the Department, in case approval of the dates is requested, and *no officer can change those dates,* as it is suggested Carter should have done.

MAJOR C. McD. TOWNSEND, Corps of Engineers, testifies:

"Q. What date would your advertisement bear?

A. It might bear any date. It would be an advertisement that had been approved by the Secretary of War, —that is by the Chief Clerk's office there,—and would bear whatever date he put on it. (Rec., 2967.)

The Witness: *The advertisements * * * bear the same date * * * you get on that paper returned from Washington.*" (Rec., 2967.)

GENERAL W. P. CRAIGHILL, retired Chief of Engineers, testies in Carter's favor:

"Q. Have you ever advertised less than 30 days?

A. I have; not as Chief of Engineers, however. It ought to be explained to the court that while I was division engineer, I was also district engineer,—had a large district.

Q. And as such you made advertisements less than 30 days?

A. *Just like any other district engineer.*" (Rec., 3415.)

MAJOR F. A. MAHAN, Corps of Engineers, testifies in Carter's favor:

"Q. You have had considerable experience, have you not, in the letting of contracts for the Government in public improvements?

A. Yes, sir. (Rec., 3052.)

The Witness: I have had advertisements out for 15 days; and some for 20 days; about 5 or 6 months ago I had an advertisement out for 20 days by orders from Washington. (Rec., 3052.)

Q. Is it of any practical value to prospective bidders that 30 days, rather than 20 days, should intervene from the insertion of the first advertisement to the opening of bids; I mean, is it of any practical value to the Government?

A. I cannot see very much." (Rec., 3052.)

COLONEL W. L. MARSHALL, Corps of Engineers, then in charge of Chicago Harbor, testifies in Carter's favor:

"A. * * * Generally I advertise for 30 days; in some cases, I don't remember the dates, I have advertised for 15 days; it depends entirely upon the character of the work and the demand for it. (Rec., 3171.)

The Witness: Work well known, which has been in progress a long time, where the contractors engaged in such work are famiilar with its construction, I advertise as short a time as I think will allow them to get the specifications and be able to make a bid thereon.

Q. *Would not the amount of the expenditure have some influence upon you?*

A. *I think not; I think the amount of expenditure would not.* (Rec., 3174.)

The Witness: I have advertised all periods from 60 days down to 15 days, there is no definite rule. (Rec., 3174.)

The Witness: Especially in work that has been a long time in progress, where all the methods employed are familiar to the contractors, I think I would advertise as short a time as I could in my judgment." (Rec., 3174-3175.)

COLONEL J. H. WILLARD, Corps of Engineers, testifies in Carter's favor:

"A. * * * I have done work under contract without any advertisements at all, under formal contracts. (Rec., 3091.)

The Witness: All great contractors know what is going on before the engineers do.

Q. And that really the length of time of the advertisement is of no particular value as to such contractors?

A. No, sir. In all of my work, I know that nearly all of the large contractors know what is going to be done before I do, in general terms." (Rec., 3091-92.)

MAJOR C. McD. TOWNSEND, Corps of Engineers, testifies in Carter's favor:

"Q. Have you let many contracts for river and harbor work?

A. A good many; yes, sir.

Q. What has been your practice with regard to the length of advertising such work?

A. Some were advertised 30 days, and some between

30 and 10 days, and some less than 10 days." (Rec., 2941.)

P. SANFORD ROSS, a contractor of large experience, and an unsuccessful bidder on the big contract, testifies in Carter's favor:

"Q. What is the custom, so far as you know, of contractors with reference to keeping themselves informed as to the river and harbor work that is to be done? When did you get your first information?

A. I can only speak of my own custom; that is to get a copy of the River and Harbor Bill and Sundry Civil Bill as soon as they are passed; then go over them carefully, and note such work as is attractive to us; then have some one study up the data from the Secretary of War's reports as to previous history of the work—

Q. You mean the Chief of Engineers' Reports?

A. Yes; so as to give this data to me to determine on what work I want to examine for bidding.

Q. And all that is done before the work is advertised at all?

A. Yes.

Q. Does it make any difference, so far as your experience goes, whether the work is advertised for twenty or thirty days?

A. No; not if it is in reasonable distance." (Rec., 3762.)

L. Y. SCHERMERHORN, President of the American Dredging Company, and an unsuccessful bidder on the big contract, testifies in Carter's favor:

"A. I am now president of the American Dredging Company. (Rec., 3444.)

The Witness: It is the largest dredging company in the United States, I believe. (Rec., 3444.)

The Witness: From 1874 to 1891 I was continuously in the service of various officers of the Corps of Engineers. (Rec., 3444.)

Q. As a contractor, do you see any particular advantage to the Government, in these river and harbor works, of advertising as long as 30 days, rather than advertising, say 20 days?

A. I do not. (Rec., 3445.)

The Witness: I have seen few, if any, instances where 10 days or two weeks was not ample interval of time to prepare myself to bid upon the work." (Rec., 3445.)

R. A. BLANDFORD, a consulting civil engineer, testifies that in his compilation from the reports of the Chief of Engineers, in 49 contracts, extending over a period of 17 years, and covering works on the Atlantic and Gulf Coasts, *every one had been advertised for less than* 30 *days.* (Rec., 3099.) (Rec., Vol. 26.)

G. Y. WISNER, Director of the American Society of Civil Engineers, who formerly served as an assistant in many engineer offices, testifies in Carter's favor:

"Q. What has been the custom of engineer officers under whom you have served with respect to the length of time of advertising for proposals for work?

A. Depends entirely on the necessity,—running all the way from ten days to over a month." (Rec., 2607.)

J. R. GILMORE, who was General Gillmore's Chief Clerk for 20 years (Rec., 3528), testifies in Carter's favor as follows:

"A. We have advertised for 30 days, and at times for much less than that; I think sometimes 15 days and 20 days, depending usually on the urgency of the work." (Rec., 3527.)

J. W. O. STERLY, a witness for the Government, testifies in Carter's favor as follows:

"Q. Was the advertisement accompanying that Exhibit "E," the advertisement being Exhibit E-1 (big contract), published as authorized and directed by the Chief of Engineers?

A. Yes, sir.

Q. In the newspapers and for the length of time authorized?

A. Yes, sir." (Rec., 11194.)

Sterly also testifies concerning the custom of advertising by General Gillmore (who was Capt. Carter's commanding officer), from whom Carter derived his office methods. In the following table is a list of General Gillmore's advertisements, which shows that General Gillmore never considered it necessary to advertise 30 days, and that in one case he actually advertised only 8 days:

Work	First Advertisement	Opening of Bids.	Reference.
Bwk. Har.	Dec. 30, 1879	Jan. 12, 1880	(CM 1124)
Wrecks	June 7, 1880	Jan. 30, 1880	(CM 1126)
Cum. Sd.	Aug. 3, 1880	Aug. 31, 1880	(CM 1124)
Bwk. Har.	Aug. 18, 1880	Sep. 7, 1880	(CM 1128)
Sav. Har.	Sep. 11, 1880	Oct. 2, 1880	(CM 1127)
Sav. Riv.	Oct. 26, 1880	Nov. 15, 1880	(CM 1125)
Cum. Sd.	Oct. 11, 1881	Nov. 1, 1881	(CM 1115)
Sav. Har.	May 13, 1882	May 25, 1882	(CM 1126)
Cum. Sd.	Aug. 12, 1882	Aug. 28, 1882	(CM 1125)
Sav. Har.	Nov. 1, 1882	Nov. 11, 1882	(CM 1128)
Sav. Har.	Nov. 3, 1882	Nov. 11, 1882	(CM 1126)
Sav. Har.	Nov. 4, 1882	Nov. 18, 1882	(CM 1118)
Sav. Riv.	Nov. 18, 1882	Dec. 9, 1882	(CM 1119)
Alt. Riv.	Jan. 15, 1883	Feb. 7, 1883	(CM 1121)
Rom. Mar.	Feb. 8, 1883	Feb. 26, 1883	(CM 1127)
Sav. Har.	July 26, 1884	Aug. 16, 1884	(CM 1129)
Cum. Sd.	Aug. 16, 1884	Sep. 11, 1884	(CM 1126)
Sav. Har.	Sep. 18, 1884	Oct. 17, 1884	(CM 1129)
Sav. Har.	Nov. 3, 1884	Nov. 17, 1884	(CM 1127)
Sav. Har. (Tybee)	May 20, 1885	June 11, 1885	(CM 1130)
Sav. Har. Cum. Sd. etc.	Sept. 11, 1886	Sep. 30, 1886	(CM 1113)

For further evidence that the work done under Captain Carter was always advertised exactly as required by the Chief of Engineers, under whose supervision all works of river and harbor improvement are performed, see (Rec., 8004-09.)

The plans, specifications and advertisement for the work under the big contract, were sent forward by Captain Carter, July 18, 1892; were approved by the Division Engineer, July 19, 1892; were approved by the Chief of Engineers, July 20, 1892; and were approved by the Secretary of War, July 20, 1892, in the following words:

"Approved, S. B. Elkins, Secretary of War." (Rec., 1459.)

Under that advertisement, bids were to be opened August 20, 1892 (Rec., 1461); the authority to advertise reached Savannah July 26, 1892 (Rec., 1462), and the first advertisement appeared July 27, 1892. (Rec., 1461.)

On August 18, 1892, orders from Washington called in all proposals under that advertisement, and required bids to be submitted under a form which covered both jetty work and dredging in one contract. (Rec., 1464), and to those same specifications and plans, which had previously been approved, were added other plans and specifications covering the dredging work, and authority was asked to advertise for bids under the combined specifications.

Under such circumstances 10 days would have been long enough to advertise.

GEN. W. P. CRAIGHILL, Chief of Engineers, testifies:

> "If I had advertised a work, and none of the bids was satisfactory and they were all rejected, the work had been well canvassed; it did not seem necessary that under those circumstances the work should be advertised for 30 days, especially when time was often precious to get to work as soon as possible. Then I would limit the time perhaps to 15 or even to 10 days." (Rec., 3425-27.)

But Captain Carter asked for a longer time than 10 days, requesting that bids should be received September 17, 1892 (Rec., 1467), *thus making a total length of advertisement of nearly 60 days.* The specifications and the authority to advertise for bids to be opened September 17, 1892, were approved by the Chief of Engineers August 20, 1892, in the following words:

> "Respectfully submitted to the Secretary of War, with recommendation that these specifications be approved. * * * If the specifications are approved, it is also recommended that the within request for authority to publish advertisement and print specifications be granted." (Rec., 1494.)

On the same day the specifications were approved by the War Department as follows:

> "The specifications are approved. By order of the Acting Secretary of War, John Tweedale, Chief Clerk" (Rec., 1494),

and on the same day the authority to *advertise* was granted:

> "*Approved as amended.* L. A. Grant, Acting Secretary of War." (Rec., 1495.)

On August 22, 1892, the first advertisement appeared (Rec., 1467) for bids to be opened, September 17, 1892; *on August 24, 1892, Carter asked to have the specifications so changed that Greene & Gaynor would not have a monopoly of the work* (Rec., 1466); on August 27, 1892, the Secretary of War authorized that change (Rec., 1466); and on September 17, 1892, bids were received for the work, and the Chief of Engineers directed the award of the contract to Greene and Gaynor. (Rec., 1476.)

In every case the orders from Washington were observed, and bids were always received on the dates selected and approved by the War Department.

J. W. O. STERLY, a witness for the Government, who was formerly the Chief Clerk in the Savannah office, testifies:

"Q. *Did your office ever receive general authority to advertise in the newspapers?*

A. *No, sir.*

Q. *You never advertised except under special authority received in each case?*

A. *Yes, sir.*

Q. *Did the application for authority to advertise always contain the dates,—the date of advertisement and the date when the bids were to be opened?*

A. *Yes, sir.*

Q. *Were those dates in all instances adhered to, except in the case* which you have spoken of here?*

A. *To the best of my knowledge they have always been adhered to.*" (Rec., 1528.)

Mr. Erwin admits there was no law requiring Carter to advertise in a manner different from what he did (Rec., 8272), but he insists that Carter ought to have ignored the orders of the War Department, and ought to have advertised for a longer time than he was ordered. The Chief of Engineers, however, in an official order issued July 9, 1889, and referring to that very question of advertising, and to Carter's practice at Savannah, said:

"*It is not left to the logal engineer to determine when, in what papers, and how he will advertise for proposals for Government work. The final decision is left to the War Department, and a careful examination shows that the usual course has been invariably followed.*" (Rec., 8374.)

When specifications and advertisements are considered and approved by the War Department, a copy of the advertisement, on a separate sheet of paper, is sent along with the official copy of the specifications and advertisement. Inasmuch as this *copy* was not acted upon at times, and hence differs at such times from the *original* advertisement (which is a part of the specifications and contract), the complainant now contends that the *copy* of the advertisement ought to

(*) The exception referred to relates to the 1896 contracts, and is as follows:

"Q. Then on August 15th, the office was authorized to advertise for proposals and bids to be opened July 6th; do you know who authorized that change from July 6th to September 8th,—of your own knowledge?

A. Of my own knowledge I know that this change was authorized in the specification by the Chief of Engineers." (Rec., 1523.)

have been followed by Carter, instead of the *original* advertisement which was a part of the contract. That contention is entirely without merit, for a simple inspection of the contract (Ex. 78; Form 19) will show that the original advertisement attached to the specifications, formed "a part of this contract."

That Carter took precautions to have the advertisements published the moment he was ordered to do so, is shown by the fact that when he was away from his office he *telegraphed* to his clerk, Connolly, to have the advertisement published. (Ex. 266.)

That Carter took every precaution to have the dates of the published advertisement agree exactly with the dates he was ordered to insert by the War Department is shown by the fact that when he was away from his office, he *telegraphed* to his clerk, Connolly, the exact dates of the official advertisement, so there might be no mistake. (Ex. 267.)

The proposed specifications for the 1896 contracts were submitted on June 6, 1896, and it was then suggested that bids be received on July 6, 1896. The matter was not acted upon in the War Department until August 15, 1896 (Rec., 1524), hence that department changed the date of opening bids from July 6, 1896, to September 8, 1896, and directed bids to be received on that latter date. (Exs. 79 and 86.)

Complainant's solicitor now asserts that Carter changed the date of opening bids from June 6, 1896, to September 8, 1896, but his assertion is in direct conflict with his own evidence.

J. W. O. STERLY, a witness for the Government (who was chief clerk in the Savannah office), testifies as follows:

> "Q. Then on August 15th, the office was authorized to advertise for proposals and bids to be opened July 6th; *do you know who authorized that change from July 6th to September 8th,—of your own knowledge?*
>
> A. *Of my own knowledge, I know that this was authorized in the specifications by the Chief of Engineers.*" (Rec., 1523.)

The complainant produces a letter from one D. V. Howell, dated September 7, 1892, in which he says "the time is extremely short for us" to bid on the jetty work under the big contract. (Rec., 1475.)

As that work was first advertised on July 27, 1892, (Rec., 1461), or 45 days before Howell wrote his letter, his complaint is not worth consideration.

This is the same Howell who failed at Savannah in 1879. (Ref. H.)

For further details, see (Rec., 8004-09; 8282-87; 8374, 8409-11; 8426-28.)

—4—

CLEARNESS OF SPECIFICATIONS.

The complainant contends that the specifications were, in general, obscure and misleading.

A complete answer to this charge is that the specifications were carefully scrutinized, changed and approved by Carter's superior officers. However, as a matter of fact, they were clear and explicit, as will appear from the following:

The Division Engineer, the Chief of Engineers, and the War Department, all carefully considered and approved the specifications. (Refs. G. and No. 2.)

J. W. RUTHERFORD, a competitor of Greene and Gaynor, testifies:

"Q. In reading that specification, was the character of the work to be done clear to you?

A. Very. (Rec., 736.)

"Q. In your judgment, as an Engineer, and as a contractor, were these specifications of such a character that you could thoroughly understand them?

A. I could understand them; I had no difficulty." (Rec., 3238.)

A. R. STEWART, a competitor of Greene and Gaynor, testifies:

"Major Raymond: Were you present when the bids were opened?

A. Yes, sir.

Q. I understood you to say that you were acquainted with the other parties who bid on this work?

A. Yes, sir.

Q. Did you hear any complaints among them that there was any unfairness?

A. No, sir, I never hear a word.

Q. Did you ever hear of any charge of favoritism being shown, or that the specifications were drawn so that they favored one bidder more than another?

A. I never heard anything of the kind. (Rec., 653.)

GEORGE Y. WISNER, an experienced civil engineer, testifies with regard to the specifications:

"Q. Could you from those specifications in the two contracts, have prepared an intelligent bid on the work, knowing the local conditions?

A. Yes, sir.

Q. Were they sufficiently explicit for that purpose?

A. I think so." (Rec., 2625.)

MAJOR F. A. MAHAN, Corps of Engineers, testifies concerning those specifications:

"Q. You think they are so clear that there is only one construction that can be placed upon them?

A. I would have no difficulty, if those specifications were handed to me, to make an estimate on them." (Rec., 3070.)

COLONEL THOMAS H. HANDBURY, Corps of Engineers, testifies:

"Q. If you drew specifications to carry out a certain project,—you as District Engineer,—and those specifications passed through the hands of your superior, who was the Division Engineer. He criticises them, interlines, and makes various suggestions in an endorsement, and finally the specifications are adopted by the Chief, certain of the changes of the Division Engineer being adopted in the final specifications. Does the responsibility of drawing those specifications rest solely, then, upon the District Engineer?

A. I should think not.

Q. Who shares the responsibility with him?

A. I should think the responsibility should be shared with the Division Engineer and also with the Chief of Engineers, who approves those specifications,—approves them and authorizes them to be published. The usual course is for the Engineer Officer to draw up the specifications. He submits them through the Division Engineer to the Chief of Engineers, and he asks authority to enter into a contract under those specifications, and, also, at the same time, authority to have those specifications printed; and my view of the matter is that the Engineer Officer in charge, the disbursing officer is and always has been—that those who review those specifications are to a certain extent responsible, or that the responsibility rests with him, with the Division Engineer, and with the

Chief of Engineers for those specifications,—for the specifications to the contract." (Rec., 3508.)

C. P. E. Burgwyn, a competitor of Greene and Gaynor, testifies:

"Q. Was there anything of obscurity in the specifications that prevented you from bidding?

A. No. * * *

Q. * * * Was there anything obscure with reference to the designs of the mattresses, or number of designs?

A. Oh, no; that was perfectly plain." (Rec., 12938.)

James A. Bryan, a competitor of Greene and Gaynor, testifies:

"The specifications were clear and understood by everybody." (Rec., 1034.)

John L. Grim, a competitor of Greene and Gaynor, testifies:

"All the bidders fully understood the specifications, so much so that deponent would not have lessened his prices any, if all the explanations given orally by Captain Carter had been written out in the specifications." (Rec., 1008.)

For further details, see (Rec., 8314-16.)

—5—

Giving Specifications to Bidders.

The complainant alleges withholding of specifications from prospective bidders for work, as follows:

It is conceded by the complainant that every man who expressed a desire to bid on the work, and asked for specifications, got them at once; but, as bids are required to be made in triplicate, it is claimed that when Captain Carter sent out specifications to inquirers, he ought at once to have sent three copies instead of following the custom of his former chief, General Gillmore, which was to send one copy to those he did not know wished to bid, with the statement to the inquirer that, if he desired to bid on the work, two more copies of the specifications would be sent to him on request.

No witness testifies that three copies of the specifications ought to have been sent at first to every inquirer; in fact the testimony given by Sterly, a witness for the complainant, shows that General Gillmore and Captain Bailey, Corps of

Engineers, who were Captain Carter's superior officers and predecessors in the Savannah District, sent one copy at first, just as Captain Carter did, when he afterwards became a disbursing officer. (Rec., 1890-96.)

The manner of distribution of specifications by General Gillmore is shown by the following letters of his assistants, Captain Post, Captain Bailey and Lieut. Carter:

"U. S. ENGINEER OFFICE.
CHARLESTON, S. C., Oct. 30, 1882.

Mr. R. S. Burnett,
Savannah, Ga.

As requested in your letter of 27th inst., I beg to send you herewith *a copy of specifications* for work of improvement of Savannah River below Augusta, Ga.

Very respectfully your obedient servant,

JAMES C. POST,
(Rec., 1890.) *Captain Engineers U. S. A.*"

"SEP. 5, 1884.

Col. James Atkins,
Savannah, Ga.

SIR:

By direction of Capt. Bailey, I have the honor to send you herewith *one copy each of specifications.* * * * The bids for both of these works will be opened at Gen. Gillmore's office. * * *

Very respectfully your obedient servant,
(Rec., 1891.) W. H. PORTER."

"SEP. 22, 1886.

Mr. J. E. Sudler,
Asst. Engineer Harbor Board,
Baltimore, Mr.

SIR:—

There are sent to you by to-day's mail *one copy specifications.* * * * If you desire to bid, additional copies of the specifications, * * * will be sent you upon application.

Very respectfully your obedient servant,

O. M. CARTER,
(Rec., 1893) *1st Lieut. Corps of Engrs. U. S. A.*"

That the method followed by General Gillmore, Captain Post, Captain Bailey and Captain Carter is the customary one, and that every man who expressed a desire to bid got specifications, is shown by the following testimony:

MAJOR F. A. MAHAN, Corps of Engineers, testifies in Carter's favor:

"A. *When applications are received from persons whom I don't know, for specifications, I always send 1 copy, and generally a memorandum with it to say that if they want more they can have them; but I never send more than one copy at first, unless it be a person who I know perfectly well is going to bid.*

Q. If there are contractors who have worked in your district, or for other reasons you know they are responsible, and are likely to bid, you send three specifications?

A. Yes, I send three; but *they can get as much information out of one as out of three.*" (Rec., 3053.)

COLONEL J. H. WILLARD, Corps of Engineers, testifies in Carter's favor:

"A. * * * I do not send specifications to everybody. There are many people who ask for them, not known to be engaged in contract work.

Q. You do not send any to those?

A. No, sir.

Q. And if a man simply writes and asks you 'please send me specifications,' how many would you send him?

A. If he is known in the list of contractors, I would send him the complete set, because I should make up my mind that he intended to bid.

Q. And if you did not know him?

A. I would send him one. He would read them over, and if wants to bid, he will immediately apply for the others." (Rec., 3092.)

MAJOR C. McD. TOWNSEND, Corps of Engineers, testifies in Carter's favor:

"A. I have made it an invariable rule to send to prospective bidders first one copy, and my practice was to mark in blue pencil on the one copy the clause which requires that the contract shall be made out,—or, specifications when submitted,—should be in triplicate.

Q. You say your invariable practice was to send out first one copy?

A. It was, and is today.

Q. What was your reason for doing that?

A. Well, half the people that I send specifications to don't expect to bid; and half the other half won't bid; and the remaining one-quarter will usually soil the speci-

fications before they get ready to make the bid, so that I shall have to supply them with additional copies to submit the bid; and it would be a pure waste of paper to send any more out." (Rec., 3021.)

GEORGE Y. WISNER, Director American Society of Civil Engineers, testifies in Carter's favor:

"Q. Are you familiar enough with the conduct of various engineer officers in river and harbor work to speak of the method in which information is given to prospective bidders by the engineer officer in charge?

A. Generally, on application; sometimes personally, and sometimes written application. The replies from the engineer officer in some cases will send all three of the required sets of specifications, and sometimes only one; I think in the majority of cases only one, except to contractors who are known to be in a class of contracting such that they will in all probability bid on the work." (Rec., 2607.)

P. SANFORD ROSS, a contractor of large experience, and a competitor of Greene and Gaynor, testifies in Carter's favor:

"Q. What have you learned with reference to the custom of engineering officers in giving out specifications, or what has been your experience?

A. Oftentimes on application they will send you one copy and notify you if you decide to bid they will send the three copies." (Rec., 3762.)

L. Y. SCHERMERHORN, President of the American Dredging Company, and a competitor of Greene and Gaynor, testifies in Carter's favor:

"Q. What was the practice, when you were serving the Government, of the engineer officers over you in sending specifications to applicants; was it the practice to send one or more than one to each applicant?

A. I think in the earlier parts of my service it was the custom to send two or three copies of the specifications, some officers sending two, and others three. More latterly but a single copy was sent out, with notice to the contractor to whom it was sent, that if he desired to bid upon the work additional copies of the specifications would be furnished him upon application." (Rec., 3445.)

J. R. GILMORE, who was General Gillmore's Chief Clerk for twenty years, testifies in Carter's favor:

"A. * * * Some parties would ask for a full set of

specifications, men who were known to be contractors; and when the supply of specifications was ample, we would send them the count. On many other occasions we would receive requisitions for specifications, and usually in these cases a single copy would be sent out, with the information that if they desired to bid, the complete set would be furnished; that occurred when the supply was not very large. We had, I might say, a great many inquiries for specifications from persons who apparently didn't care to bid, when they learned the character of the work, and never asked for the complete set afterwards." (Rec., 3528.)

"Q. *Those customs did obtain at the time Captain Carter reported for duty?*

A. *Yes, sir; they were the usual customs.*" (Rec., 3529.)

Even the witnesses for the complainant testify they never failed to get specifications at once upon announcing a desire to bid upon the work.

W. H. VENABLE, a witness for the Government, testifies in Carter's favor:

"Q. Did you make efforts to secure specifications to enable you to make a bid?

A. I did.

Q. How did you secure them?

A. I requested Capt. Carter to give them to me.

Q. That is when you did secure them?

A. Yes, sir." (Rec., 1537.)

T. J. AGNEW, another witness for the Government, testifies in Carter's favor:

"I stated that I would call on Saturday for the specifications, which I did, and I got them." (Rec., 1488.)

F. A. D. HANCOCK, another witness for the Government, testifies in Carter's favor:

"A. * * * He (Captain Carter) said for the purpose of maintaining his records in the office, he would not *give* me the specifications, but he would have the proper letters sent to my office, *which he did promptly.*

Q. He sent you a letter then, promptly, containing the specifications?

A. Yes, sir." (Rec., 1532.)

JAMES FOLEY, another witness for the Government, testifies in Carter's favor:

"A. * * * Captain Carter then handed them (the specifications) to me, and asked me if I wanted any information about how the work was to be done, and said he would assist me in any way he could, towards figuring or anything else." (Rec., 1551.)

"Q. When you went to get these specifications, that was all a joke wasn't it? You didn't want them, did't need them, and you had no idea of bidding?

A. No, I had no idea of bidding.

Q. Ain't the truth of the matter that you bet drinks with a man that you could get them, they were so easy to get?

A. I bet I could get them." (Rec., 1552.)

There is no evidence to the contrary.

For further details, see (Rec., 8009-10, 8286-87.)

—6—

NUMBER OF BIDDERS.

The complainant does not produce any evidence tending to show there were too few bidders for the work to be done under the big contract,—it is just *argued* there were too few.

That work was not only a large work, involving the expenditure of about $2,250,000 for the jetty work alone, but it was a very difficult work as well. (Rec., 8729.)

Concerning a much less difficult work at the mouth of the St. Johns River, the complainant offers the following testimony:

MAJOR W. M. BLACK, United States Engineers, a witness for the Government, testifies:

"A. * * * There are a very few bidders. * * * It was a work that was considered dangerous to a contractor, risky work, and we did not have at the mouth of the St. Johns River very many bidders." (Rec., 699.)

COLONEL G. L. GILLESPIE, Corps of Engineers, let a contract for 500,000 yards of dredging when there was only *one bidder* for the work. (Rec., 8319, 8729.)

CASSIUS E. GILLETTE, a witness for the Government, admitted he had a contract for about $35,000 worth of work

awarded to A. J. Twiggs in January, 1903, *without any competition whatever,* testifying concerning that as follows:

"Q. What with regard to the contract of January 7th, 1903, with Twiggs?

A. I think about $35,000, something like that; between $25,000 and $40,000; I don't remember exactly.

Q. How many bidders on that contract?

A. Two bids, and all rejected at that time; and a new contract was made (with the approval of the Chief of Engineers) to continue the work under the Hunter & Frey contract, at the same price. A. J. Twiggs (who was their agent) had just completed the previous contract." (Rec., 4463.)

—7—

TARRED ROPE.

The specifications required the fascines to be tied with "tarred rope," and it is contended by the complainant that this requirement was not complied with, in that a very frail material called "lath yarn," was used instead of "tarred rope."

If Captain Gillette had ever had any experience with brush fascines, he would have known that "lath yarn" is simply the commercial name for the "tarred rope" which was required by the specifications, and which is always used for tying engineering fascines.

A. E. KASTL, an engineer of great experience, testifies in Carter's favor concerning this material:

"A. * * * In some parts of the country they call it tarred rope, and some parts of the country they call it lath yarn." (Rec., 2830.)

The Witness: "It is ordinarily called yarn or tarred rope.

Q. Is it similar to that you saw used at Brazos and at Tampico?

A. Yes, sir; that is the kind we used, or similar kind." (Rec., 2830.)

GEORGE Y. WISNER, an engineer of long and successful experience in harbor work, testifies in Carter's favor:

"Q. In the construction of brush fascines, what is usually used as the binder?

A. Binder of lath yarn." (Rec., 2612.)

MAJOR F. A. MAHAN, Corps of Engineers, testifies in Carter's favor as follows:

"Q. * * * I hand you a sample of what is known technically or commercially as lath yarn. * * * That material which you hold in your hand has a tensile strength of 198½ pounds; I will ask you if you would accept that from a contractor as fulfilling the requirements of tarred rope for the purpose of binding fascines?

A. I think if the engineer in charge of the work were satisfied that was strong enough, I should not hesitate to accept it at all. Rope is only a generic term." (Rec., 3055.)

R. A. BLANDFORD, a hydraulic engineer of long experience, testifies in Carter's favor:

"Q. What name, commercial name, does that rope or string, or whatever you choose to call it, go by?

A. Lath yarn.

Q. Is it tarred or not?

A. It has some tar in it.

Q. Did you test its strength at any time?

A. I did; I made a test last January of lath yarn.

Q. Similar to that on the new fascine in the court room?

A. I did.

Q. And what was its tensile strength?

A. 198½ pounds, I believe." (Rec., 2996.)

The Witness: "The best cotton grocers' twine had a strength of 14½ pounds." (Rec., 2996.)

MAJOR C. McD. TOWNSEND, Corps of Engineers, testifies concerning a letter to the Chief of Engineers of May 31, 1898, in which he states that the specifications in use for the past 20 years in the engineer district at Rock Island, Illinois, required "tarred rope" as a binding material, and that under those specifications "*the material employed in binding was what is usually known as 'lath yarn,'*" and he testifies the Chief of Engineers told him it was his province to decide whether that material was in compliance with the contract. (Rec., 12243.) See, also (Ref. 9).

For further details, see (Rec., 8311-12.)

To meet the foregoing evidence, the complainant introduces but one witness, Cassius E. Gillette.

C. E. GILLETTE testified that the material used by Carter was not "tarred rope," but was "lath yarn" and that it was

"probably as strong, but not twice as strong as a single string of good grocer's twine." (Rec., 1100.)

"Q. Was that spun yarn of sufficient strength to enable sufficient choking to be done on a bundle?

A. No, sir. * * *" (Rec., 1100.)

On cross-examination, when he found out he was caught, and learned that lath yarn and tarred rope were the same, and that grocer's twine and lath yarn had both been tested (by Blanford) and the strength of grocer's twine found to be only 14½ pounds, while that of lath yarn was 198½ pounds, Gillette came back to the witness stand and admitted he had testified falsely, saying of the lath yarn:

"A. * * * It is a great deal stronger than my description of it as I worded it would mean; it is stronger than I thought it was. * * * It may be stronger even than I think it is now. It is quite strong material." (Rec., 1127.)

This is the same Gillette *who used that very material in tying his own alleged model fascines,* of which his employe, A. S. COOPER, testified:

"A. They were tied with lath yarn.

Q. You are talking about Captain Gillette's fascines now?

A. That was used for both; lath yarn will apply to both; it was used for both." (Rec., 1208.)

—8—

CARTER DID NOT HELP GREENE AND GAYNOR GET THE BIG CONTRACT.

The complainant alleges that Carter aided Greene and Gaynor in securing the big contract. There is no proof whatever; it is simply *asserted.*

The fact is that Carter took every care to let all bidders have a fair chance to bid, and actually caused Greene and Gaynor to lose the dredging contract, amounting to $900,000.

The references to the evidence in support of those statements have already been given in Request No. 8, and need not be repeated here.

For further details in relation to this matter, with refer-

ence to the letters, contracts, advertisements, etc., see (Rec., 8024-27, 8380-81).

The testimony of H. R. Duval as to Carter's refusing to help Greene and Gaynor save $375,000 in freight on stone is of importance in this connection.

H. R. DUVAL testifies:

"A. I am president of the South Bound, which runs from Columbia to Savannah, and of the Florida Central and Peninsular, which runs from Savannah south to a good many points in Florida." (Rec., 3190.)

The Witness: "We settled upon it with the Atlantic Contracting Company that $1 from Florida, and $1.50 from Columbia, would be the rate. * * * When I returned to New York, I met Captain Greene of the Atlantic Contracting Company. He was waiting for me. He came in and said, 'We cannot pay you the rates we have agreed to pay you on stone, $1 and $1.50; we have a proposition from a firm of barge people here to carry this stone from New York at 49c a ton, and you will have to reduce your rates, or we will close with these people. * * * It was a very serious matter on 500,000 tons of stone. A reduction of 10c would have been a very serious matter, and of course, the greater the reduction the more serious it was; but we did not propose to lose the carrying of that stone, even though we should carry it at an unproductive rate. I investigated the practicability of this barge line and without coming to any conclusion; I went to Jacksonville and discussed the matter with our General Manager and Traffic Manager, and we concluded that I should come to Savannah, and ask Captain Carter if he believed the barge line was a practical thing to do; so I came to Savannah and said to Captain Carter 'I wish to ask you a question; if it is improper for me to ask it on account of your official position, I will withdraw it.' He said: 'Ask it, and if it is improper, I will not answer it, and you can withdraw it.'" (Rec., 3194.)

The Witness: "I told Captain Carter that the rates had been agreed upon at $1 and $1.50, and that the contracts had been made on that basis; that Captain Greene had come to me and assured me that he would take this business by the barge line at 49c a ton if I did not make that rate; and, to get this business I would have to meet that rate.

Q. You told him you would have to meet it?

A. I would have to meet that rate, and I did not wish to do it; * * * but still, as a matter of controlling the stone at that point, I proposed to carry the stone; and I said: 'Is the barge line a practical thing; can he supply the stone with the barge line; and are my rates too high?' Captain Carter said: 'There is no impropriety in asking me that question; that they based their contracts upon the rates of $1 and $1.50 a ton; that he understood that was to be their rates; that it was low enough; that our Traffic Manager talked to him about the rate at the time that the contractors had contracted expecting to pay $1 and $1.50 a ton; and that the barge line was totally impractical, * * * and he advised me to hold to my rates, which were just and fair.'

Q. Had he said the thing might have been tried, what would have been your action?

A. I should have been governed by that and reduced my rates.

Q. That would have made $1 a ton less to Florida, from Columbia?

A. Yes, sir; and 50c on the Florida rock.

Q. 50c from Columbia?

A. One dollar from Columbia.

Q. And a saving of $1 to whom?

A. To the contractor." (Rec., 3194-5.)

Q. If they had done it, it would have been a loss of $375,000 to the railroad?

A. Yes, sir; $250,000 on the Columbia stone, and $125,000 on the Florida rock.

Q. Pardon me for asking you the question; but there was no collusion or conspiracy between Captain Carter and yourself with reference to a division of that $375,000?

A. I would never have suspected Captain Carter of being in collusion with anyone; I should not have been his friend if I had.

Q. Did Captain Carter in that conversation with you know that he could control that reduction of rates?

A. Yes, sir, of course. I said to him: 'I want your advice; it is a very serious matter,' and I presume he thoroughly understood that I would act on his advice." (Rec., 3196.)

"Q. That enabled you to insist on your rates?

A. I maintained my rates, and if the work had not

been interrupted, should have been carrying the stone still at those rates." (Rec., 3196.)

Not only did Carter refuse to aid Greene and Gaynor, but he also refused to do anything which might flavor of interference with them.

During the contract of 1896 at Cumberland Sound, Mr. Duval suggested to Captain Carter that he make a suggestion to Mr. W. T. Gaynor, who was managing the work, which would help Mr. Duval's road, and Captain Carter wrote to Mr. Duval as follows:

"SAVANNAH, Ga., December 18, 1896.

My dear Mr. Duval:

After thinking over our conversation of yesterday, concerning matters at Fernandina, I have concluded that it would not be proper for me to make any suggestions to Mr. Gaynor concerning methods of procuring material. He is rather afraid of the officers under whom he works, and, thinking to please, might regard a mere suggestion from such a source as conveying a veiled order. I would not have such a contingency arise nor have a contractor feel that I would interfere in any way with his business arrangements, hence I think it wiser to say nothing to him or his representatives.

* * * * * *

I am,

Very truly yours,

O. M. CARTER.

Mr. H. R. Duval,
32 Liberty Street,
New York, N. Y."
(Rec., 4691.)

To that letter, Mr. Duval replied, as follows:

"NEW YORK, December 21st, 1896.

"Personal & Confidential.

Dear Captain:

I have yours of the 18th, and thoroughly concur in your conclusions, and indeed it would not do in any way for you to risk even the criticism. I hope to be down very soon after the 1st of January,—say about the 10th, and

meantime I wish you a Merry Christmas and a Happy New Year.

Yours very truly, &c.,

H. R. DUVAL.

Captain O. M. Carter,
Corps of Engineers, U. S. A.,
(Rec., 4690.) Savannah, Ga."

Another charge against Carter is that he sent to the Secretary of State of West Virginia for a copy of the charter of the Atlantic Contracting Company, the complainant contending that this indicates Carter had some interest in that company. The facts are as follows:

The first advertisement for the big contract was dated July 20, 1892, for bids to be opened August 20, 1892. Carter heard that the Atlantic Contracting Company had been organized by various people to bid on the work. Carter's orders, in the plans and specifications, required him to know whether bidders were combining together. That provision is as follows:

> "20. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested." (Ex. 78.)

On August 10, 1892, which was 10 days before the bids were to be opened, Carter sent for the charter of the Atlantic Contracting Company, so as to know who were interested in it, and paid for the copy of that charter out of his own pocket. (Ex. 219.) This was 14 days before Carter wrote his letter to the Chief of Engineers, protesting against letting the contracts in such a way as to permit Greene and Gaynor to get the whole work at their own price. (Req. 8.)

If Carter had been in collusion with Greene and Gaynor, he could have obtained a copy of the charter from them without paying for it.

Another charge of "conspiracy" against Carter is that, instead of paying Greene and Gaynor with one check, he gave them several checks, which altogether amounted to what was due them at the respective dates those checks were issued.

If Carter had made out several checks, and then one of those checks had been traced to him or to Westcott there might be something in the charge, but there is no pretense of any such thing. (Rec., 7749-51.) For the reason why checks were made as they were, see (Rec., 7481.)

The complainant claims it is a suspicious circumstance that Carter employed W. G. Austin, who had received a medal of honor from Congress for distinguished gallantry under fire. The only basis for this claim was that Austin was looking for a job, and knew Greene, because his father had worked for Greene, when Greene was an engineer officer; and Greene told Austin to apply to Carter for a job, and on account of Austin's splendid record as a soldier, Carter employed him. After Austin had worked for a while, Carter let him go. (Rec., 13041, 8237-38, 8349.)

Another charge against Carter is in connection with what is known as guide piling, *i. e.*, piles which were driven as guides for vessels navigating the Savannah River. In his decision, Senator Edmunds criticised Carter on account of that guide piling, but in so doing, he entirely misunderstood the situation. The facts are as follows:

After harbor works are completed, the Light House Board marks those works which are dangerous to navigation; but while such works are in process of construction, the Light House Board *does not mark them*, but leaves that duty to the Engineer Officer who is constructing the works.

In Savannah Harbor, structures dangerous to navigation were marked by Carter with what is known as "guide piling," *i. e.*, piles were driven along the dangerous works, to serve as guides to vessels navigating the harbor. Those piles had to be driven as fast as the work progressed, but instead of driving one or two piles per day, to mark the danger line of the work done during that particular day, Greene and Gaynor usually did a day's pile driving at a time, and thus drove enough piles ahead to mark the danger line of the work for several days to come. The expense of driving only one or two piles per day would have been prohibitory.

It is uncontradicted that those piles were driven by Greene and Gaynor for $6.40 each, and that this is less than half of what the United States would have paid for such work in the open market. (Rec., 3683-85.) After the piles were driven, vessels navigating the river sometimes were moored to them, and sometimes Greene and Gaynor hitched their tug boats, etc., to those piles, while they were doing the work under the big contract; so the complainant now claims the piles were solely for the benefit of Greene and Gaynor, and that they ought not to have been paid anything for them.

Regular navigators knew the old obstructions in the river,

hence fewer piles were needed to mark them than to mark new work, the location of which was unknown to all navigators, since the works in progress changed from day to day.

The necessity of those guide piling is shown by the following testimony:

CAPTAIN M. P. USINA, who had been a pilot in Savannah Harbor for "nearly 39 years," testifies:

"Q. Will you state to the court whether or not the placing of that piling there is of any benefit to commerce or navigation?

A. Yes, sir; I think they are beneficial. They are very useful at night, or in thick weather, for navigating the river.

Q. In what way?

A. In preventing vessels from grounding on these jetties submerged in the water. When the tide is over them, the only evidence of their locality is this piling." (Rec., 3536.)

"Q. Do you happen to know that a quantity of humble people on Daufuskie Island are accustomed to come across in small boats?

A. Yes, sir.

Q. And without the piling, would they not be driven upon the dams?

A. There would be a great risk of it; yes, sir." (Rec., 3537.)

A. S. COOPER, a witness for the Government, admitted on cross-examination that when the guide piling was not kept up as close to the work as it ought to have been, loss of life resulted, saying:

"I know that one boat ran into dam 14 during the storm, and was capsized and some men drowned." (Rec., 1983.)

CAPTAIN JOHN FITZGERALD, a pilot on the Savannah River for "39 years," testifies:

"Q. Do you remember what are known as the guide piles down the river, to indicate the existence of the submerged dams?

A. I do.

Q. Are they of any benefit to pilots and others navigating ships in the Savannah River?

A. Quite a benefit to pilots in foggy weather.

Q. Keep you from running upon the dams?

A. Yes, sir." (Rec., 3539.)

That it was thoroughly understood those guide piles were for the benefit of commerce and navigation, at the time they were driven, is shown by the testimony of Thomas J. Daniels, the Inspector for the Government, who was in charge when they were driven.

THOMAS J. DANIELS testifies:

"Q. Did you ever have any talk with any assistant engineer with reference to guide piles,—as to whose benefit they were for?

A. Yes, sir.

Q. Who was that man?

A. A. S. Cooper.

Q. What was the conversation?

A. * * * Mr. Cooper came to me and told me to report them, as *they were driven for the benefit of the Government, to keep small boats off those dams.*" (Rec., 3404-05.)

Even Attorney General Griggs found Carter innocent of that charge against him. (Report of Griggs, p. 4.)

Another charge against Carter is that, when he went away from his office, he told his clerk to notify Greene and other prospective bidders when the plans and specifications for the 1896 contracts were made and issued by the Chief of Engineers.

It takes a vivid imagination to see anything wrong in that.

Another charge against Carter is that he visited the work being done at Winyaw Bay, S. C., in 1891, the complainant arguing that this proves Carter had an interest in the contract for that work, which was being done by Greene and Gaynor.

The facts are that Carter visited that work under orders from the Chief of Engineers, in order to inform himself concerning the engineering methods which were being used there by Colonel W. H. Bixby, Corps of Engineers, who was in charge of that work. (Rec., 3601-03.)

Carter visited the harbor works at Vera Cruz and Tampico, Mexico; at Galveston, New Orleans, etc., in the same manner. (Rec., 3601.)

The testimony of Colonel Bixby, together with copies of the letters Carter wrote to Bixby before going to see that work, are to be found at pages (Rec., 3277-8) of the court martial record.

Another charge of "conspiracy" against Carter is as follows:

In order to keep the harbor at Savannah from deteriorating, the Secretary of War, about 1893, established harbor lines, *i. e.*, lines beyond which no structures should extend, and no material should be deposited. The City of Savannah, however, in violation of law, caused ballast rock to be deposited at Quarantine beyond the harbor line, and in the spring of 1896, at Captain Carter's suggestion, the Secretary of War required the City of Savannah to remove the rock thus illegally deposited. Instead of going to the expense of removing that rock, the city sold it to Greene and Gaynor, who removed it.

When Gillette reached Savannah in July, 1897, he hunted up that matter and caused Carter to be charged with recommending the removal of that rock, so that Greene and Gaynor might buy it at a low price.

That rock cost the city nothing (Rec., 3334); it was ballast rock, and under the law could not be taken to the city for use (Rec., 3334); it was illegally deposited by the city, with the knowledge that it would have to be removed (C. M. 1420); there was no market for the rock (C. M. 1417); and two Mayors and several Aldermen of Savannah testify they were glad to get rid of the rock, and would have been willing to give it away, and that the price they received from Greene and Gaynor was fair and just (Rec., 3302; 3229; 3334; 3337-39; 3392).

Moreover, the uncontradicted evidence shows that *the City of Savannah sold to Greene and Gaynor rock which was not beyond the harbor line, and which they did not have to remove, at a less price than they got for the rock in question* (C. M. 1418; 3471), thus proving that Carter's action could not possibly have aided Greene and Gaynor in any way.

Even the court martial found Carter innocent of that charge. (G. O. 172 of 1899.)

Another charge of "conspiracy" against Carter is as follows:

When work under the big contract at Savannah was in progress, one Brown, a sub-contractor under Greene and Gaynor, asked Captain Carter to inspect some Florida stone which he was furnishing, so that he might know what proportion of it fell below the contract requirements, etc., and Carter did as he was requested. (Rec., 3629.)

About 1896, Brown sued Greene and Gaynor, claiming they had rejected an undue proportion of his stone. Captain Carter was summoned as a witness in that suit, and testified about

his inspection of Brown's stone, the proportion of it which failed to meet the contract requirements, his orders to his inspectors not to accept stone below those requirements, etc. (Rec., 3630.)

When Gillette reached Savannah in July, 1897, he allied himself with the Brown faction, and caused Carter to be charged with having sworn falsely in that suit, for the purpose of aiding Greene and Gaynor. There is no pretence of any evidence to sustain the charge of Gillette against Carter, and even the court martial found Carter innocent of that charge. (G. O. 172 of 1899.)

Another charge against Carter is that Greene and Gaynor sometimes cashed the checks they received for work done under their contracts, instead of depositing those checks in some bank for collection; but the evidence is uncontradicted that Carter had no means of knowing how those checks were paid, because checks drawn against the Sub-Treasury do not go back to the one who issues them (as private checks do), but remain in the Sub-Treasury; hence Carter never saw the checks he draw, after he delivered them, and could not know their final disposition.

C. N. JORDAN, the Assistant Treasurer of the United States at New York, testifies as a Government witness (concerning one of those checks) as follows:

"Q. * * * You know as a matter of fact, from your experience as Assistant Treasurer, that that check never went back to Captain Carter, don't you?

A. I do; it is charged up in his account.

Q. And he never saw it again?

A. Never that I know of.

Q. And could not have seen it again without making a special request upon the Sub-Treasury; that is right, is it not?

A. That is right; he would have to make a request upon us to get it." (Rec., 2365.)

Another charge of "conspiracy" against Carter is that, 'way back in 1885, he was present at a convention of delegates from the southeastern states, held at Savannah, for the purpose of adopting measures to induce Congress to improve Southern Harbors. It is not necessary to notice such a charge as that.

—9—

MILITARY FASCINES.

It is contended by the complainant that the specifications, used by Captain Carter, required the use of military fascines, and that such a requirement was misleading, inasmuch as the use of such fascines was not contemplated.

That contention is based upon the construction of the phrase "well-trimmed," which forms a part of the specifications for the brush.

The specifications under which the work was done required that the brush mattresses should be made of fascines, and that:

> "All fascines will be made of live brush. * * * The brush used shall be as straight and well-trimmed as can be obtained." (Ex. 78; §39.)

Those requirements were originally placed in the specifications many years before by General G. A. Gillmore, Corps of Engineers, so that the local engineer could exact the degree of trimming necessary for each particular part of the work, without making the Government liable to claims for "extra work" by the contractor; and those requirements had been so satisfactorily expressed, and were so thoroughly understood by everybody, that the original requirements had been retained in all succeeding specifications. (Rec., 562-63.)

The following testimony shows that the requirement of the specifications was a proper and necessary one, and that Captain Carter used exactly the kind of fascines contemplated by the specifications to the contracts:

GENERAL W. P. CRAIGHILL, Chief of Engineers, testifies in Carter's favor as follows:

> "My understanding of the words 'well-trimmed' is properly trimmed; done well, properly trimmed. That is what I mean by well-trimmed; *properly trimmed for the object which it was intended to accomplish.*
>
> Q. Would you understand by that, that each brush or small tree was to be trimmed of all limbs and reduced to bare poles?
>
> A. Not at all, no. I did not mean to say that. I said reasonably, properly trimmed. That is to say, having the fact in view it was intended to leave on it a reasonable amount of small twigs and of the leaves, if it was intended to collect sediment." (Rec., 12210.)

The Witness: *"On some work, under the same specifications, you might want a training wall or something where you didn't want the twigs and leaves, and in another part of the same work you might want the leaves all cut off, and the engineer under these specifications, in my judgment,—I, if I were the engineer would claim that I had the power to order the contractors to do whatever I thought best."* (Rec., 12215.)

The Witness: "The engineer in the use of that expression has the right to require absolute trimming, if you understand what that means, that is, trim off everything down to bare poles, or else to leave on as much as he thought, for that particular work, was necessary and proper." (Rec., 12218.)

"Q. I will ask you whether or not, in your opinion as an engineer, a bundle of rods tightly bound at intervals, or an artificial log, is a fascine within the meaning of that description in the contract?

A. I should not so consider it." (Rec., 3419.)

The Witness: "With reference to fascines and brush work generally, I have this to say: When they are intended to catch sediment the less trimmed they are, the better." (Rec., 3442.)

"Q. Would you think it would be necessary to put it in the specifications that it should be well-trimmed; is that a sufficient definition?

A. I see no objection to it. Officers write their specifications according to the peculiar English that they are in the habit of using; all specifications do not read alike by any means." (Rec., 3443.)

"Q. In drawing specifications, if you have specifications which have served your purpose during a period of years, do you commonly retain those specifications in the language, or do you change them?

A. Unless there is some reason for changing it, they would be generally retained. My specifications run back for years, and preserve the same phraseology, as far as applicable to the new conditions.

Q. Where a phrase has been used for a series of years in a specification, and it has served its purpose, then I will ask you whether or not it is an advantage or disadvantage to change that phrase, or substitute another?

A. *I should certainly retain it, unless there was some reason for stinking it out.*

Q. Then. If the word 'well-trimmed' had been used by General Gillmore in this district as applied to a brush fascine some 16 or 17 years ago, as I understand you, unless you had some good reason to change it, you would keep it in the specification?

A. I would." (Rec., 3443.)

JOHN H. WESTERFIELD, a civil engineer of long experience, who was first employed by General Gillmore in the Savannah District in 1881, testifies in Carter's favor:

"Q. Did you ever see a brush fascine used in this engineering district?

A. Yes, sir.

Q. When, as nearly as you can say, was the first brush fascine used that you saw?

A. Those that I recollect of, were some time in 1885, in the summer of 1885. They were the regular fascines used in construction work.

Q. Were they made of brush?

A. Mostly of brush; yes, sir." (Rec., 3460.)

"Q. Do you know whether or not General Gillmore used the phrase 'well-trimmed' in his description of fascines?

A. I think so.

Q. What interpretation was put upon that by him, if you know?

A. That the fascines should be 'well-trimmed' meant that no projecting limbs should interfere with the lying of that fascine close to another fascine; that they should lie snug; that the few small limbs that projected at right angles so as to interfere with the laying of the fascines should be removed. * * * It was not a bundle of poles, it was a bundle of brush." (Rec., 3460.)

GEORGE Y. WISNER, one of the most prominent civil engineers in America, testifies in Carter's favor:

"Q. What do you understand, as an engineer, as to the meaning of the phrase 'well-trimmed' in that description?

A. In general practice, in laying fascines in engineering work, 'well-trimmed' means simply, with brush of a nature like the brush which is found in Georgia, that

the branches which would extend out so as to make the fascines ragged, will be clipped so as to lie down smooth, and be bound in with the rest of the brush." (Rec., 2611.)

"Q. Does that mean the removal of all the twigs and leaves?

A. No, sir.

Q. Would that be a proper construction, to remove the twigs and leaves?

A. No, sir.

Q. Why?

A. It would destroy the real use of the fascines for mattress work.

Q. Why?

A. As stated before, the brush is intended for the collecting of silt as well as the building up of the jetty, and such a fascine would not do it.

Q. The collection of the silt helps to make the wall or the jetty?

A. It helps to make the wall and makes it secure." (Rec., 12111.)

The Witness: "*The ordinary use of 'well-trimmed' depends entirely on what you want it for, I might say to a man 'I want a fruit tree out there well trimmed'; and if he went out there and cut off all the branches and leaves, I would not consider that as necessary, that would not be 'well-trimmed.' The tree would be ruined. You would ruin your tree. If you trimmed all the leaves and branches off, you would ruin it for fascines.*" (Rec., 2693.)

When Mr. Wisner was asked whether a fascine of bare poles would be in accordance with the specifications, he replied:

"A. It would not." (Rec., 2611.)

General William Ludlow, Corps of Engineers, afterwards a Major-General in the United States Army, and Military Governor of Havana, testifies in Carter's favor as follows:

"Q. I will ask you if, in your opinion as an engineer, the phrase 'well-trimmed' means a reduction of the brush to bare poles, and if that contemplates a fascine made of poles or rods tightly bound together at intervals of two feet, constituting an artificial log?

A. I think not.

Q. Does 'well-trimmed' in that description mean the taking off of the leaves and twigs and smaller branches, in your opinion, bearing in mind the purpose for which the fascine is to be used?

A. If it is a brush fascine, intended to constitute a part of a brush mattress, the more leaves and twigs you have on the better, as long as it does not interfere with the choking." (Rec., 3003.)

COLONEL WILLIAM T. ROSSELL, Corps of Engineers, formerly Engineer Commissioner of the District of Columbia, testified as follows:

"A. I should say that to interpret words like these it would be necessary to know for what purpose the fascine was to be used, and *the words 'well trimmed' would have a certain difference of meaning in different cases.* If they were to be used in one case, the words 'well trimmed' might be very little trimmed, or trimmed entirely of the leaves or branches. I think those terms sometimes gain a meaning at some particular point where they are used.

Q. If it were true that in specifications prepared under General Gillmore in this District, dated September 18, 1884, descriptive of fascines, this language were used: 'Fascines shall be made of live brush, well trimmed and closely choked,—if it be true that that language was used as far back as 1884, and ever since that time, in all specifications in this District where brush mattresses were to be used, would those facts have any influence upon your mind in the interpretation of the phrase 'well trimmed'?

A. Yes, sir.

Q. If the fascines built under that contract which you held in your hand, Exhibit No. 2, were made of brush and branches, and twigs which projected outward at an angle to the main stem being lopped off and bound in with the other brush,—would that, in your opinion, satisfy the description in Exhibit No. 2?

A. I think it would, if that was the same way it had been done previously under previous contracts. Where a contract like that comes on, the contractors will go to an officer and ask for an interpretation before bidding, very often, and then the interpretation comes up. I

should say, if that was the way it was done for years past, that would satisfy the conditions." (Rec., 2998.)

COLONEL WILLIAM L. MARSHALL, Corps of Engineers, then in charge of Chicago Harbor, testifies in Carter's favor as follows:

"Q. I will ask you what your interpretation of the phrase 'well trimmed' in that description of the fascines would be?

A. I would interpret that, in the first place, that all material in that brush which is unfit for mattress work, that is, all dead wood and sticks; should be cut out; and that the limbs which proceed from the stalks that are too stiff to bend over, are either cut from the stalks or folded in with it, knit or folded against the stem of the brush, so as to make fascines as described.

Q. Under the description 'well trimmed,' would you reject any of the live brush, the twigs or the leaves, or would you bind them in with the fascine?

A. The live brush is exactly what we wish in brush fascines. We would not reject any brushy material as long as it was suitable." (Rec., 3166.)

"Q. A fascine has been described in evidence in this court somewhat in this language: 'A fascine consists of poles, small poles, bound at intervals.' Elsewhere the same witness described such a fascine as an 'artificial log.' Under the specifications which I have read, would you deem the engineer officer in charge authorized to allow such a fascine to go into this work?

A. No, sir I; would not. It is not a brush fascine. You could not make a brush fascine of any such material.

Q. Such a fascine as I have described has been called during the trial of this case a 'military fascine,' as distinguished from a 'brush fascine,' and I understand you to say that such a military fascine is not permissible under the specifications which I have read. Is that correct?

A. It is not permissible, and would not answer the purpose of a brush mattress." (Rec., 3167.)

MAJOR F. A. MAHAN, Corps of Engineers, an officer of large experience, testifies in Carter's favor as follows:

"A. * * * We will assume, as we are speaking of brush, that here is a sapling as growing; the branches

at the top, near and parallel with the central shaft; the branches lower down, standing out at a larger angle; my interpretation of the specifications, which I believe is the question asked, is that these larger branches, shall be either partly cut through, or wholly cut through, so that they can be bent up close against the shaft, or this upper part left in addition; so that the whole thing, with its leaves, twigs, and everything of the kind, shall go together.

Q. And be bound into the structure?

A. All parts of the structure." (Rec., 3054.)

"Q. Do you think 'well trimmed' would provide for a fascine of that kind?

A. Undoubtedly.

Q. You think it would?

A. Certainly.

Q. Would you make use of that description if you were, to-day preparing specifications?

A. I think I should.

Q. Do you think it is a necessary description?

A. *I think that is a proper description to cover the ground I should wish to cover.*

Q. Do you think it is a necessary description?

A. Yes; I think that would do; there ought to be some description; I think that does as well as anything." (Rec., 3083.)

"Q. It is in testimony here from Captain Gillette that he interprets the fascine specifications as 'a fascine composed of a bundle of small rods,' or as he elsewhere phrased it—

Judge Advocate:—He gave that as Webster's definition, not his.

Q. Which Captain Gillette gives as Webster's definition, which was satisfactory to him and which he gave to this court as his own interpretation of this specification; elsewhere, he denominated it as a 'military fascine' such as he had constructed as a Cadet; I will ask you in your opinion as an engineer, whether or not such a fascine would satisfy the requirements of the specifications which I have read to you under the contract of 1896?

A. I should say no; that certainly would not satisfy me; and if a man were to offer them, I would reject them." (Rec., 3055.)

Colonel Joseph H. Willard, Corps of Engineers, later in charge of Chicago Harbor, testifies in Carter's favor as follows:

"Q. What do you understand to be the meaning of the phrase 'well trimmed'?

A. It means that the projecting larger branches may be cut off and thrown in with the mass, or nicked and bent down, so that you can bind the brush together in bundles.

Q. What would you say of a fascine constructed ostensibly under those specifications in which all the twigs and branches and leaves were lopped off and thrown away, leaving nothing but bare poles?

A. That would not conform to the specifications.

Q. Those poles or rods bound together in a bundle?

A. That would not comply with the specifications. The specification is to have brush, twigs, and smaller parts, in with the rest." (Rec., 3092.)

Colonel Thomas H. Handbury, Corps of Engineers, who built the great improvements at the mouth of the Columbia River, testifies in Carter's favor:

"Q. I will ask you what is your understanding of the use of the phrase 'well-trimmed' in connection with the brush fascine?

A. I should take that to mean that just merely the outer ends of the twigs should be cut off, so that the fascine could be easily handled and easily put in place.

Q. One witness here testified that he understood the description of a fascine in this contract which I have read to you, to mean a bundle of rods tied at intervals. Elsewhere in his testimony, the same witness said that such a bundle of rods built under these specifications, might be called an 'artificial log.' I will ask you if, under the specifications I have read and now show you (handing witness paper), a fascine composed of rods denuded of twigs, branches and leaves, a bundle of bare rods tied tightly at intervals, or an artificial log, so-called, would come within the meaning of that specification?

A. I think not.

Q. I will ask you if the engineer officer in charge could compel the contractor to furnish such a bundle of rods under that contract?

A. I don't think he could." (Rec., 3506.)

"Q. But have you ever, in preparing your specifications made use of that phrase as a description,—'Made of brush as well-trimmed as can be obtained'?

A. I do not remember of using that language, but *that is the ordinary language used in specifications for work on the Atlantic coast, and down on the Gulf.*" (Rec., 3518.)

When Colonel Handbury was asked by the prosecution if specifications could be misinterpreted, he replied:

"A. You could hardly write a sentence that somebody could not put two or three different constructions on especially in writing up specifications." (Rec., 3508.)

The Witness: "The specifications cannot always cover everything, and much latitude has to be left to those who are interpreting the specifications and carrying out the contract, or we could never get anything done if we did not." (Rec., 3520.)

Major C. McD. Townsend, Corps of Engineers, testifies in Carter's favor:

"Q. Have you had any experience with brush mattress work?

A. Yes, sir.

Q. Where?

A. My first experience was on the Appomattox River, when I was assistant under Colonel Craighill. Then I had experience for about 6 years on the Mississippi River in the construction of mats.

Q. How much mats did you put in in any one year on the Mississippi River?

A. I have been putting it in by the mile; do you mean in yards?

Q. Yes, approximately.

A. Four or five hundred thousand square yards a year, I think, I did in one year." (Rec., 2939.)

The Witness: "I have been expending in the vicinity of $800,000 a year in mat construction." (Rec., 12235.)

"Q. What is your opinion as to the use of those words 'well-trimmed' with reference to a fascine for hydraulic engineering?

A. *A fascine which would be well trimmed when it is sufficiently trimmed for the purpose for which it was intended to be used,* is the best definition that I know of them.

Q. You have been to Savannah, and were there and are familiar with the work that was carried on, or the location of the work that was done there, under Captain Carter?

A. I am familiar with the location.

Q. The location of the work?

A. Yes, sir.

Q. Do you know the Savannah River, which you understand, was a silt bearing stream?

A. I saw the Savannah River, yes, sir.

Q. Would it, in your opinion, be proper to use fascines in the building of training walls and spur dams in Savannah Harbor, out of fascines in which the brush and twigs and leaves had been entirely removed, and made a bundle of rods, or not?

A. I would not consider it a good engineering construction.

Q. Would you consider a construction for use in the harbor and vicinity of Savannah of a fascine which was a cylindrical bundle of rods, within the specifications of the contract, when intended to be used in that work?

A. No; the contract calls for brush fascines, not rods. It calls for brush, and that is what I should think was required there, needed there." (Rec., 12236.)

Concerning the meaning of the words "well-trimmed," the following letter was written by Major Townsend, May 31, 1898, from Rock Island, Illinois, where he was then stationed, to the Chief of Engineers:

"There are in force in this District 5 contracts for the following construction of dams and shore protection which contain the following specifications:

> 'Fascines shall be made of live brush, well trimmed and closely choked, 20 feet long, and from 12 to 15 inches in diameter, and tied with bands of tarred rope or wire, not more than 3 feet apart.'

There are also numerous informal contracts for supplying brush, which contain similar requirements. During a recent inspection of the work being done under a contract with Patterson Bros., opposite Fairport, Iowa, I found that the fascines were composed of brush which had only been trimmed by lopping off such branches as were at right angles to the main stem; that the choking was such that by standing on the fascines, I could insert the toe of my shoes between the band and the brush;

and that the material employed in binding was what is usually known as lath yarn. I am informed by the Chief Clerk of this District, Mr. C. P. Comegys, these specifications are similar to those that have been in force in this District for the past twenty years, and by Assistant C. W. Durham, that the fascines I inspected are better than the average accepted, not only by the late Colonel King, but also by his predecessor, Lieut. Col. A. Mackenzie, Corps of Engineers, U. S. A.

In view of the fact that my veracity, and that of other officers of the Corps of Engineers, has been questioned by the Prosecuting Attorney for the United States Government in the recent courtmartial of Captain O. M. Carter, Corps of Engineers, U. S. A., when stating that such fascines should be accepted under similar specifications prepared by him, I have the honor to request instructions as to whether such fascines shall be accepted or rejected under the contracts in this District."

Major Townsend testifies concerning that letter, and the opinion for which he asked the Chief of Engineers:

"Q. Did you get that opinion?

A. He told me that *I should have to decide that question myself; that was my function.*" (Rec., 12243.)

Major W. M. Black, Corps of Engineers, a witness for the complainant in this case, testifies in Carter's favor:

"Q. Conceive these fascines to have been made of rods, tightly bound together at intervals of two feet, absolutely denuded of leaves and twigs, would you consider that as valuable as a brush mattress of the same construction?

A. No, sir; that is not as valuable as a brush mattress of the St. Johns specifications. (Similar to Savannah specifications.)

Q. Because brush is what you want?

A. Because brush is what you want." (Rec., 2545.)

"Q. You know there is a marked distinction in engineering between a brush fascine and a military fascine?

A. Yes,—marked.

Q. And a brush mattress would be of brush fascines?

A. Yes, sir." (Rec., 2542.)

The Witness: "Military fascines are trimmed close, so that they resemble a log of wood. A fascine for jetty work is choked as tightly as a military fascine, but the

brush is not trimmed, in order that it may bulge out between the binders." (Rec., 749.)

"Q. *Then you never saw a strictly military fascine in river and harbor work?*

A. *Never.*" (Rec., 2542.)

Major Thomas H. Rees, Corps of Engineers, who had been on duty in the Savannah District for four years, and who was then Assistant Professor of Engineering at West Point, testifies in Carter's favor concerning the phrase "well-trimmed":

"Q. What interpretation was put upon that by you and Captain Carter?

A. I believe that expression was used in all specifications for fascines in this district; it was generally understood that the brush was to be so trimmed that it would lie close in a fascine, and to be bound into approximately a cylindrical shape.

Q. With all the twigs?

A. With all the twigs, leaves and small brush retained in the fascines." (Rec., 2849.)

"Q. By whom do you mean it was generally understood.

A. By all the employes of this office, and by the contractors.

Q. By all the prospective bidders outside of those who had been familiar with the methods here?

A. By all who had any experience in this kind of work, it would naturally be assumed to mean brush as used here.

Q. By those who had any work to do in this district?

A. No, sir; all who had had any work of this character in any district, in any place.

Q. It would be generally understood to know that trimmed brush meant well trimmed brush?

A. In connection with work of this character, they would know that this kind of brush would be used, for it is always on all work of this kind." (Rec., 2880.)

L. Y. Schermerhorn, a civil engineer of long experience on river and harbor work, President of the American Dredging Company, and a competitor of Greene and Gaynor, testifies in Carter's favor:

"A. My construction of the term 'well-trimmed' would be the trimming off of such crooked portions of the brush, or obstinate portions of the brush, which prevented the brush being fairly reducible to a uniform size of fas-

cines. It would not mean the removal of small portions of the brush.

Q. Not the removal?

A. It would not mean the removal of them.

Q. Would it be what is commonly known as a military fascine or bundle of rods?

A. I would not consider it was intended to represent fascines of that kind, or a bundle of rods." (Rec., 12434-35.)

J. W. Rutherford, a civil engineer of great experience in the use of brush in hydraulic construction, and a competitor of Greene and Gaynor, testifies in Carter's favor:

"A. 'Well-trimmed' has only one meaning to it in that connection I think, and that is, the branch to be nipped off close and bent over, so as to be tightly bound together, and make as great an obstruction as possible to whatever is in suspension in the water, and prevent erosion.

Q. Would it, in your judgment, require the brush to be trimmed down to straight poles, and the fascines made of such straight poles?

A. In my opinion that would defeat the object the fascines are intended for.

Q. And that would not be the meaning of the words used in the specifications?

A. It could not by any possibility be considered so.

Q. Then you, as an engineer and as a contractor, expect to have all the brush possible, and leaves and twigs, left on the fascines under these specifications?

A. Why, certainly, the more twigs and smaller branches, etc., the better for the purpose of a fascine of that description." (Rec., 12883.)

Lyman E. Cooley, a prominent civil engineer of Chicago, who has had great experience in such work, testified in Carter's favor:

"Q. Now, another criticism that is made upon this work—and you may understand whenever I ask you any question about any work, that I refer to the work done under the big contract in Savannah, which was let in 1892, unless I state otherwise, and that is the work to which I have just referred and to which these witnesses refer—refer to that and perhaps others—refer to that anyhow—in their criticism that is made upon this work, is that the contract calls for bundles of rods tied together

with a rope, and does not call for brush, and that Carter, instead of putting in brush logs, ought to have put in logs made out of bundles of rods, which some of the witnesses claim, is the description of a military fascine; will you please examine the specifications critically, as to the third design of mattress, and as to the description of the fascines of the mattress, and see whether it calls for brush logs, with the twigs left on and the leaves left on, or whether it calls for a bundle of log rods, with the twigs cut off and the leaves cut?

A. *I see nothing in it that calls for bundles of rods. I can't see how it can be given that meaning, because such a construction would appear to me to be entirely unsuitable for the purpose.*

Q. You mean, a bundle of rods, called military fascines, would not be suitable for the purpose of use in the deep water like Savannah Harbor?

A. Comparatively speaking.

Q. And you find nothing in the specifications that indicates that?

A. No, sir; and the nature of such work, the experience and the state of the art, would lead you at once to the assumption that the brush, and nothing else, was intended." (Rec., 8539-40.)

"Q. Now, let us take the description of fascines, as stated in this so-called big contract of 1892 at Savannah, which appears in printed volume of contracts, at page 291, paragraph 39, Fascines. (Reading said paragraph as follows:) 'All fascines will be made of live brush of cedar, water oak, myrtle sweet gum, or any other variety of wood approved by the Engineer Officer in charge. The fascines will be from twelve (12) to one hundred (100) feet in length, and must be compressed tightly by an approved form of choker, to a diameter of nine (9) inches at intervals of two (2) feet, where they must be bound firmly with wire or tarred rope of approved strength. The brush used shall be as straight and well trimmed as can be obtained; the fascines shall be carefully and thoroughly made and handled with care. They shall be piled on shore or on barges for measurement in such a way as the Engineer Office in charge may direct.'

Now, I will ask you, considering that description of fascines, what does this part of the clause mean, from an engineering standpoint: 'The brush used shall be as straight and well trimmed as can be obtained?'

A. I should say that crooked and gnarly brush that would not press into a fascine properly would be excluded and that the words 'well-trimmed' means sufficiently trimmed, properly trimmed, very much like the word 'well' when you say 'well done' in a contract.

Q. Does it mean that all projecting limbs shall be trimmed so as to lie flat along the brush, if you take a piece of brush that has got limbs projecting, or what does it mean?

A. It means that any limbs that would interfere with the proper making of the fascine would be either removed or topped in such a way as to lie down in line.

Q. In point of practice, how would a fascine like that description be made?

A. The brush would be gathered; they wouldn't cut any brush that was not suitable in the first place. It would be a waste of effort. It would be put into a species of continuous saw-buck arrangement and piled up in there until there was sufficient brush there.

Q. You mean what they call a wooden horse arrangement?

A. Yes, sir.

Q. Something like a wood cutter would use in sawing wood, only larger and longer?

A. Yes, and compressed by some lever arrangement, choked, as it were, down to the power diameter and lashed. In the meantime, all these limbs that interfered with the material coming together properly would be lopped or removed.

Q. The limbs would be trimmed down so as to lie flat, or almost flat, along the line of the particular bush it was attached to, or cut entirely off?

A. Yes, so as not to interfere with the proper quantity of brush to go into it, and so as not to interfere with the fascine itself, so it would lie in pile, or conjointly with other fascines, and would not be ragged." (Rec., 8562-63.)

E. A. Gieseler, an employe of Captain Gillette, and a witness for the Government in this case, testifies in Carter's favor:

"A. Well, the specifications say the brush which goes into the fascine shall be well trimmed; now, I do not know that that would mean that all the small branches should

have to be trimmed off,—I doubt that. That, of course, would be a question which might be answered differently. I should judge that under the specifications it would be quite admissible to put in small stuff, as long as it is proper stuff and as long as the whole thing can be well choked afterwards into a fascine. It seems to me that the term 'well-trimmed' does not forbid that." (Rec., 1331.)

"Q. Is it not a fact, Mr. Gieseler, that these terms 'bundles of brush' and 'military fascines' have sprung up here since Captain Gillette has come?

A. Yes, I should judge so; that is, rather, the distinction between military fascines and other fascines I have never heard made before. In fact, Captain Gillette explained to me what it was.

Q. You got your impression from him, then?

A. I got my impression of what a military fascine was from him; all I know about a military fascine I got from him certainly.

Q. Now, you have seen this work, you know the results of it,—which is the better fascine for work in this river, Captain Gillette's military fascine, or Captain Carter's brush fascine?

A. *I don't believe in Captain Gillette's fascine for work of this kind, and I have told him so.* I believe that fascine is the best which has the greatest number of fine twigs or branches in it, and that fascine is the poorest one which which has the fewest number of branches in it. In both cases the mattress must be well choked.

Q. Will you explain why you have that preference?

A. I have that now, and for the reason that the office of the fascine is to hold the bottom, that is, hold the particles of the bottom to protect against scour. Generally this office is performed by friction between the particles of the bottom and the superficial area of the component parts of the fascine. That fascine that has the greatest superficial area will be the best to hold the particles of the bottom, on account of the friction with them. Now, if you take the two extremes; taking a single log 9 inches in diameter, that would have only a very small superficial area; if a fascine is composed of sticks of ¼ inch diameter, the sum of the superficial areas of those sticks would probably be 6 or 7 times the superficial area of the log; if you make those sticks still smaller, it would be still greater. Of course, there is a limit, but

theoretically it would be the case. That is why I prefer the brush stuff down to the practical limit.

Q. *The fascine as actually used by Captain Carter has accomplished its work?*

A. *Judging from experience, and what we see in Savannah Harbor, it is to be presumed that it has.*" (Rec., 1328-29.)

It is claimed to be a suspicious circumstance that under the same description of fascines, Carter required more trimming of the brush when the fascines were used to revet river banks (such as the work done at Augusta by Gaynor in 1891 and by Twiggs in 1893), than when the fascines were used under water in the river or harbor to collect sediment and to form a mud bank; but that was the very object of the requirement, *i. e.*, to permit the engineer to exact the degree of trimming necessary for the particular work he was doing.

General W. P. Craighill, Chief of Engineers, testifies:

"* * * *On some work, under the same specifications, you might want a training wall or something where you didn't want the twigs and leaves, and in another part of the same work you might want the leaves all cut off, and the engineer under these specifications in my judgment,—if I were the engineer, would claim that I had the power to order the contractors to do whatever I thought best.*" (Rec., 12215.)

The Witness: "*The engineer in the use of that expression has the right to require absolute trimming if you understand what that means; that is, trim off everything down to bare poles, or else to leave on as much as he thought, for that particular part of that particular work, was necessary and proper.*" (Rec., 12217.)

For further details, see (Rec., 145-48; 8294-97).

—10—

Quantities Estimated and Used.

It is alleged by the complainant that the specifications set forth certain approximate quantities, on which bids were canvassed, and that in actually using other quantities, the specifications were unfair.

The contract contemplated such changes in quantities as were made, since in a large work of that character, it is impossible to foresee just what quantities may be required; hence the contract provided:

"For the purpose of canvassing bids, the following will be assumed as approximate quantities * * * but *the foregoing quantities are liable to be increased or diminished as may be found necessary.*" (Ex. 78; § 48.)

"*The engineer officer in charge * * * will, if he thinks proper, be at liberty to increase or decrease the relative quantities of all materials, after due notification to the contractor, without any change in the contract prices.*" (Ex. 78; § 49.)

"*The decision of the Engineer Officer in charge as to quality and quantity shall be final.*" (Ex. 78; § 32.)

An examination of Rec., 13319-26 shows that other engineer officers so interpreted those provisions of the contract:

In fact the increased materials used over and above what was estimated ran as high as 519 *per cent. in the case of General Q. A. Gillmore, Corps of Engineers, and as high as* 419 *per cent. in the case of Col. Mansfield, who was a member of the court martial which convicted Captain Carter!*

Gen. W. P. Craighill, retired Chief of Engineers, when asked whether Captain Carter had the power under the contract to change the relative quantities of materials, testifies in Carter's favor:

"A. The specifications, if you recollect, give the engineer complete power as to the quantity, as to changes in the quality and quantity of material. * * * Here is one paragraph of this contract which is very precise. It says (reads): 'Paragraph 32. *The decision of the engineer officer in charge as to quality and quantity shall be final.' He is not obliged to refer it to the Chief of Engineers; that is part of the contract.* * * * *It is a plain English sentence; it means what it says, that the engineer officer is the finad judge as to the quality and quantity, relatively, of the materials that are to be used in the work under his charge.*" (Rec., 3438-39.)

Colonel Thomas H. Handbury, Corps of Engineers, testifies in Carter's favor:

"Q. It is in evidence here that Capt. Carter put brush mattresses along the foundation of those extensions of the two jetties to the amount of 446,000 square yards, and, in so doing he extended the jetties to the full length indicated upon that chart. It is suggested in evidence that Capt. Carter had ordered eighty thousand yards more of brush mattress work, making an increase over the esti-

mate of the Board of something like twenty-five or thirty per cent. I will ask you, in your opinion as an Engineer, if that was an immoderate increase?

A. That would depend on circumstances. The increase would have to be judged of by the Engineer Officer in charge, who always, in cases of that kind, has a large latitude to go and come on, and, if he thought the necessities of the service or the necessities of the work required it, why, it would be within the limits of his authority, under the project of the Board, to increase or decrease the amount of any particular class of material that went into the structure." (Rec., 3504.)

"Q. And suppose the Engineer Officer in Charge had reported the amount put in each month to the Chief of Engineers, assuming this increase to have been gradual and uniform, would it have been necessary for him, in your opinion, to call the Chief's attention in a specially prepared report to the increase?

A. *I should think not. Those things are often done. The monthly reports go in every month to the Chief of Engineers and somebody in the office of the Chief of Engineers is supposed to read those over carefully and keep up with what is going on, and, if anything extraordinary appears in those reports, that individual will call the Chief of Engineers' attention to it.*

Q. In other words, the law requires the Engineer Officer in Charge of a work to make his monthly reports, and, if his superior officer does not read them, that is not his fault?

A. I don't know that the law requires that, but the regulations.

Q. Which is the law so far as he is cocnerned?

A. The regulations require that, and that has been the custom for many years, and is yet." (Rec., 3505.)

General William Ludlow, Corps of Engineers, testifies in Carter's favor:

"Q. Suppose the fourteen courses spoken of by the Judge-Advocate were used only here and there in a few places where the contractor had unexpectedly, or from unexpected causes, it had been done, would you consider that the Engineer, in his discretion, had authority to lay another six or seven courses on top of the six or seven below?

A. *I should think he would be derelict if he did not,* if it imperilled the safety of his work." (Rec., 3008.)

"Q. Suppose more than half had been laid with fourteen courses and the balance of it ordered?

A. It is difficult to answer that, because so much must of necessity be vested in the professional knowledge and discretion of the responsible officer. In other words, if you permit me to state, and I can only state generally in regard to these matters,—but in regard to the drawing of a contract or the interpretation of a contract, it is absolutely indispensable that the officer who is engaged in that work, and who is responsible for its success and execution, should not be hampered to any greater extent than is absolutely necessary to secure a proper accounting. You must give him rather a wide discretion on large limits, just as you give a doctor in a case; you would not prescribe his medicine in advance. You would give him the run of the drug shop, and let him use it as he pleased, and you would see that the Government did not pay for any more drugs than was actually used. Rigidity of construction must come in when it comes to the amounts of payments. There you cannot be too particular and too rigid, to see that the payments to the contractor shall represent only work actually done. But when it comes to the details of the work, you must not,—when you put a man in charge of a very difficult enterprice, one involving all the abstract laws of hydraulics, most of which are down out of sight, and of which he knows the force and difficulties,—restrict him too much. He has got to set his brains, professional knowledge, energy and ambition against these forces. When he is engaged in the struggle with them, don't hamper him too much. Let the contracts be drawn so that a liberal professional discretion is given him, and in construing the contract let it be understood the same way." (Rec., 3008-9.)

Colonel W. L. Marshall, Corps of Engineers, when asked if it was proper to sink work immediately after other work had subsided, thus increasing the quantities used, testifies in Carter's favor:

"A. I don't think that time has anything to do with it. In my mind, Colonel Barr, as I said in answer to that question, if the first series of mattresses had so subsided as to no longer be properly considered as the foundation

course of the structure, I would not consider it a departure from the specifications to put in another course. That has no reference to time whatever. It may be six hours after the first course.

Q. Suppose no record could be found in your office that the six courses had subsided at all, Major?

A. I would not expect to be considered a thief on that account." (Rec., 3178.)

COLONEL W. H. BIXBY, Corps of Engineers, Division Engineer at Chicago, testifies in Carter's favor:

"Q. *Where your contract called for brush mattresses and stone, and you were authorized to call for as much as you wanted of brush, you would feel that you were authorized to call for whatever you thought was proper?*

A. *I would certainly, if the contract were drawn like this contract.*

Q. And it would not be necessary to go and make a supplemental contract to buy a different quantity of brush and stone which you thought were necessary to go into the contract, if the contract authorized you to call for these additional amounts?

A. It would not, if the contract and specifications were similar to this." (Rec., 8681-2.)

MAJOR F. V. ABBOT, Corps of Engineers, a witness for the complainant, testifies in Carter's favor:

"Q. He (Captain Carter) increased it, as he says here, by four-fold; do you think it lies within the power of any district officer to make such an enormous change without the knowledge and the authority of the Chief of Engineers?

A. I don't know as technical request for authority from the Chief of Engineers would be required. As the facts were to be definitely reported, it becomes simply the use of more of one kind of material and less of another. The fact that the Chief of Engineers knew of the large change intended by you would carry with it the certainty that he would disapprove and stop the carrying out of the change unless it was accepted by him." (Rec., 815.)

The Witness: *"I should consider that not receiving orders from the Chief of Engineers was equivalent to an approval."* (Rec., 816.)

LYMAN E. COOLEY, a prominent civil engineer of Chicago, testifies in Carter's favor:

"Q. Criticism was made of Captain Carter on the ground that the estimate which he made in the specification, as to the amount of brush log mattresses that would probably be used, was smaller than the amount that he did use. It appears that he commenced using those brush log mattresses and that he had a superior officer, called the Division Engineer, whose duty it was to supervise his work, and he had a superior officer who was Chief of Engineers, and that he reported monthly through the Division Engineer to the Chief of Engineers, the exact amount of mattress work he was putting in there, and continued to do so from month to month until he not only exceeded what he had originally estimated, but the amount which he finally put in from month to month was three or four times as much as he had estimated. Would you consider that he was concealing anything from the Division Engineer or the Chief of Engineers when he reported monthly how much he was putting in?

A. *Directly to the contrary.*

Q. And would you think, as an engineer, that under those circumstances it was his duty, to stop the work when he had arrived at a point when he had put in as much as he was going to put in?

A. Not unless he received orders.

Q. What is that?

A. Not unless orders were received from higher quarters." (Rec., 8541-42.)

The Witness: "*A contract for specific performance in that class of work is hardly a feasible thing. It is feasible in the case of a building, where the materials are perfectly known, the conditions of labor and all the conditions of climate, and things of that kind; but when an engineer starts in to buck a river, or a tidal estuary, or something of that kind, the contract is in the nature of an assistant, and he is at war, and he has got to have some mobility in the handling of his material, and the use of his forces, and the adaptation and the changes from time to time; and in the true engineering sense the contract there is not a contract for specific performance, as I see it, at all.*" (Rec., 8560-61.)

Concerning Captain Carter's action in increasing the brush work under the big contract beyond the amount estimated, Mr. Cooley testifies:

"Q. If it appeared that use of brush mattresses prior to the contract of 1892, the big contract, if they had not been used in exceedingly large quantities and he estimated 400,000 square yards to be probably used in that contract, and as the work progressed he and the Chief of Engineers and his other superior officers found that more was to be used, it would be in perfect good faith on his part to go on and use more, would it not?

A. It would. The truth is that that character of work was in process of evolution at the time, starting out with log mattresses and gradually getting around to the idea of a straight brush mattress as the best proposition—and I think it ought to be assumed that a man's acts are approved when he submits a report and there is no objection.

Q. Then you would say, if he submitted his report monthly as to how many mattresses he was using, and as time rolled on that report showed he was using more than he put in his estimates and that kept up for months and years, you would assume that the Chief of Engineers and Carter's superior officers not only know but approved of the increased quantities, would you not?

A. There is no other assumption to make. They take the responsibility the minute the report is sent in and the office has cognizance of it." (Rec., 8388-89.)

That Carter did not help Greene and Gaynor, but saved large sums to the United States by increasing the amount of brush mattress work as he did, without calling for new bids therefor, is shown by the testimony of W. F. McCauley, an unsuccessful bidder on the big contract, and now a witness for the complainant. McCauley testifies:

"If it had been known in the beginning that the quantity of mats was to be largely increased (as it was), much higher bids would have been made for them, brush being scarce and the haul great." (Rec., 1014.)

For further details, see (Rec., 8137-40; 8312-14.)

—11—

SINKING MATTRESSES IN MULTIPLE.

For the evidence that efforts had been made for more than 40 years to improve Savannah Harbor, see (Rec., 7996).

For the evidence as to the soft bottom and sides of the Savannah River, the difficulty of building training walls, etc., see (Rec., 7997-99).

For the evidence that dams, etc., in the Savannah River sometimes went down as far as seventy feet, see (Rec., 3642).

For the methods of sinking mattresses in multiple, the reasons therefor, etc., see (Rec., 8054-55).

For the evidence as to the difficulties of building, towing and sinking the 8-course multiple mattresses, see Reference herein No. 16. See also (Rec., 8102-07).

For the evidence that the 8-course multiple mattresses had to be towed as far as 95 miles, see (Rec., 3465).

The saw-log (or brush-log) rafts used in the harbor work at Savannah were called "mattresses." When those mattresses were sunk in place one at a time, they are now called "single mattresses", whereas when they were piled up one on top of the other, and sunk in place more than one at a time, they are now called "multiple mattresses."

The contracts with Greene and Gaynor were silent as to whether the contractors should sink the rafts one at a time or several at a time. (Ex. 78.)

There is a requirement of the contract which provides that the mattresses used in the work shall be "properly placed in the work and secured there by a layer of stone" (Ex. 78, § 38), but whether that layer of stone shall be *placed directly on each mattress* (as it would be when the mattresses were sunk singly), or whether the layer of stone shall be *placed only on the top mattress* (as it would be when those mattresses were piled up one on top of the other and sunk in place more than one at a time), is *expressly left to the discretion of the Engineer Officer in charge*, for the contract provides that "*the stone used shall be * * * distributed as said engineer may direct*" (Ex. 78; § 41).

The contract does not state in express words whether the mattresses shall be sunk one at a time, *i. e.*, in "single" form, or more than one at a time, *i. e.*, in "multiple" form; but *the contract expressly gives to the Engineer Officer in charge*

the power to determine that matter, in the following contract provisions:

> "The training walls * * * will consist of *one or more courses of mattresses, placed where required.*" (Ex. 78; § 37.)
>
> "*All work must be commenced and prosecuted at such point or points, and* IN SUCH A MANNER *as may be directed by the Engineer Officer in charge.*" (Ex. 78; § 37.)
>
> "*Work will be executed under the supervision of the Engineer Officer in charge, or his representative,* WHO WILL PRESCRIBE THE ORDER *in which the materials are to be placed.*" (Ex. 78; § 49.)

It is thus seen that the engineer is expressly given power by the contract to require the mattresses to be sunk one at a time, or more than one at a time; *i. e.*, under the contract, *the engineer may require mattresses to be sunk in "single" form, or he may require them to be sunk in "multiple" form.*

Saw-log mattresses had been sunk in multiple, many at a time, placed end to end (Rec., 8049), but brush-log mattresses were so heavy and floated so low in the water that this could not be done. (Rec., 8692.)

Carter found by experiment that if eight brush-log rafts were put on top of each other on a big barge and then securely fastened together, and then the whole thing was put into the water at once, the sand and silt floating in the water would sift into the brush-log raft so fast that it would eventually sink itself; but to sink it promptly and exactly where desired, it took about the same amount of rock as it would take to sink a single brush-log raft. (Rec., 8050.)

By thus sinking eight rafts with the same amount of rock as it took to sink one raft, Carter saved seven-eighths of the rock that would have been required, had he sunk the rafts one by one.

The actual saving of stone under the big contract of 1892 was 249,412.87 cubic yards. (Rec., 8355-56.)

Greene and Gaynor had a contract to furnish this rock at $2.95 per cubic yard (Ex. 78), and some of the witnesses say that Greene and Gaynor would have made a profit of $1.10 per cubic yard on that rock, if they had been allowed to sink the rafts one at a time, as will be seen from the following:

J. L. GALLAGHER, a witness for the complainant, testifies that Greene and Gaynor paid for their stone per ton, a price of "sixty cents" (Rec., 2242); and

H. R. DUVAL testifies that he made Greene and Gaynor a rate to Savannah, per ton, of $1.00 on Florida stone" (Rec., 3193); and the prosecuting JUDGE ADVOCATE states that it would cost, to place the stone in the work, "25c a ton" (C. M. 4753), making (as this judge advocate states) "a total cost in the works of $1.85 a ton." (C. M. 4753.)

A. S. COOPER, a witness for the Government, gives the cost of stone, per cubic yard, to Greene and Gaynor at "$1.40." (B. E. Ex. 71.)

By sinking the mattresses in multiple, Carter saved the United States 250,000 (249,412.87) cubic yards of rock at $2.95 per cubic yard; *i. e.*, he saved the United States $737,500, and Greene and Gaynor lost $1.10 per cubic yard profit, *i. e.*, they lost $275,000.

Carter also made another tremendous saving to the United States, and caused Greene and Gaynor to lose enormous profits in another way.

Carter found by experiments that if he sunk (where the bottom was soft) eight single rafts, each by itself,—with the necessary load of stone on each of said single rafts to hold it down,—the weight of this enormous amount of stone would not only press the rafts too much together, but would sink the whole thing deep down into the mud. He found if he sunk sixteen rafts, each with its load of stone, making sixteen rafts with sixteen loads of stone, it would sink so deep into the mud and sand that the foundation would be no higher than it would be if he took eight single rafts, and made them into a big raft one hundred feet long and fifty feet wide and twelve feet high, and sunk the big raft with only one load of stone on it; hence he followed the latter plan, *i. e.*, he produced the same height of foundation by using eight single rafts, bound together and sunk at one time with one load of stone on it, that he would have produced if he had followed the complainant's plan of sinking sixteen single rafts, one at a time, each with a load of stone on it. (Rec., 8050-54.) (Rec., 8513-14.)

Soft bottom existed in at least one-half of the Savannah work, hence Carter's saving to the United States (in addition to the $737,500 which he saved by sinking multiple brush-log rafts with only one load of stone on them) was at least $570,000 in extra mattresses and $442.500 in extra stone (which would have been required if the complainant's plan had been followed, instead of Carter's), and Greene and Gaynor would have made

additional profits on those extra mattresses and on that extra rock. (Rec., 8054-55.)

Moreover, Greene and Gaynor had to use large quantities of wire in making multiple mattresses which would not have been required, had those mattresses been sunk singly. For this extra quantity of wire, they received no pay. The evidence shows that it took about 23,000 lineal feet of wire to bind together an 8-course multiple mattress. (Rec., 8103.)

That sinking mattresses in multiple is in compliance with the contract, as well as most desirable from an engineering point of view, is shown by the following testimony:

General W. P. Craighill, the retired Chief of Engineers, testifies in Carter's favor:

"A. So far as an engineering material to be used, I should say that the multiple mattress was quite as good as the other.

Q. And within the specifications?

A. *And admissible under the specifications.*" (Rec., 3422.)

General Craighill, as first Division Engineer and afterwards Chief of Engineers, inspected the Savannah work, and concerning this matter, Major Thomas H. Rees, Corps of Engineers, testifies:

"Q. Do you know of your own knowledge whether General Craighill, then Colonel Craighill, ever saw any of these mats (multiple mats) or ever heard their construction discussed?

A. * * * I remember their use was discussed and explained to him. I remember being present on Savannah Harbor when the use of the multiple mat was discussed and explained to him, and he asked a number of questions concerning it." (Rec., 2852.)

Multiple mattresses were at first built on shore, then launched into the water, and towed to the place of sinking, just as saw-log mattresses were, but they floated so badly that they were afterwards built on barges, and towed on them to the place of sinking. (Rec., 8692.)

When multiple mattresses were being built on shore General Craighill visited the place of manufacture, and inspected one of them on April 1, 1893, and testified about that inspection before the court martial in 1908. He testified before the Board of Engineers in 1897 that he remembered that mattress "with definiteness," and that Captain Carter "went

through the explanation of the construction of the mattress." (Rec., 902.)

GENERAL W. P. CRAIGHILL, testifies concerning that mattress:

"A. * * * We walked about upon it, Mr. Blanchard and myself and Captain Carter, and it seemed to be a fine, stable matress." (Rec., 3432.)

"Q. The fascines were very closely compacted, were they not, in the mattress?

A. That is something—

Q. You walked over them?

A. Yes, sir.

Q. They would have to be pretty closely compacted to enable you to do that?

A. Yes, I should think so.

Q. You walked on the brush?

A. Walked over the top of the mattress, yes.

Q. On the brush, and not on the grillage?

A. On the brush, yes." (Rec., 3432-33.)

The complainant's solicitor now insinuates that this mattress was built in anticipation of General Craighill's visit, but General Craighill says he did not inform Captain Carter in advance of his visit.

GENERAL CRAIGHILL testifies:

"Q. Do you know whether they were aware of your approaching visit?

A. No, I do not, I haven't any knowledge of that; *I didn't communicate with him, at any rate.*" (Rec., 3432.)

GENERAL WILLIAM LUDLOW, a distinguished officer of the Corps of Engineers, testifies in Carter's favor, concerning multiple mattresses, as follows:

"*Such a mattress, I should say, was not in contravention to any provision of the contract.* If in the judgment of the engineer officer that mattress would produce better results, and the contractor was willing to make it that way, there is nothing to prohibit it." (Rec., 3004.)

For further testimony of General Ludlow on the question as to the power of the engineer under the contract, see Reference herein No. 10, pages 116-117.

COLONEL W. H. BIXBY, Corps of Engineers, testifies in Carter's favor, on this subject, as follows:

"Q. Now, Captain Carter testifies, and I think he is

corroborated by Lieutenant Rees, who was with him at Savannah in 1893, that Rees and he ordered the contractor to put in brush mattresses in multiple, that is, say, 8 on top of each other, instead of putting them in singly there, because he found if they put them in singly, the weight of the stone necessary to sink each matress singly would be as much as the weight necessary to sink 8 mattresses, and that putting them in singly, there would be required eight times as much stone, costing eight times as much and causing eight times as much stone weight on the structure, which would sink it down to a considerable extent and not enable him to get the height which he desired, and that he found by experiments that if he required the contractor to build the mattresses in multiples of 8 and launch them as one structure, that the same amount of stone would sink that multiple mattress in place as would sink a single mattress into place, and that the subsidence or sinking in the bottom would not be near as great. If that be true, he would save to the Government by that operation seven-eighths of all the stone that would be necessary to sink 8 single mattresses, each with its load of stone, would he not?

A. On that basis, he would; yes.

Q. The saving of that stone under those circumstances would be a great advantage to the Government, would it not?

A. Yes, sir.

Q. He has given the amount of mattresses that were sunk, the amount of stone that would be necessary to sink each mattress singly, and the amount used to sink the 8-course multiple mattresses, and has figured out in detail the saving to the Government and has stated it at $737,500. If this statement is correct and if his figures are correct, that is a net saving to the Government of that amount, was it not, as compared with sinking each mat singly, each with a load of stone?

* * * * *

A. There would be a saving to the Government of the stone, of course, that was not used in sinking; they would have just that much less to pay for.

Q. It appears that this stone contract ran to Greene and Gaynor, and the Government witnesses testified that in their opinion Greene and Gaynor would have made as high as $1.10 a ton, which figures out that they would

have made about $275,000 of profits on that stone if they had been allowed to put it in in the way that Mr. Erwin claims, namely, with a load upon each single mattress instead of a load upon eight. With those facts before you, was the sinking of those mattresses in multiple a benefit to Greene and Gaynor, or a damage to them?

A. *Well, yes; from what is in front of me in this case, I should suppose that the contractor was not making anything, any profit out of the change, and that the United States was getting its work done at less expense.*" (Rec., 8508-11.)

"Q. Now, witnesses have testified that it was fully as expensive for the contractors to sink the 8-course mattress, which was a very heavy and very bulky thing and had to be sunk with a great deal of trouble and expense, that it was just as expensive to sink an 8-course mattress as it was to sink 8 single mattresses. Taking that fact also into consideration, your answer would be the same, would it not? I mean, would that change be of benefit to the United States, and of no apparent benefit, as far as the facts go that I have stated to you, to the contractor?

A. Well, if they could sink eight of them with the same stone and in the same time that they could sink one, it was a clear gain both in time and funds to the United States.

Q. And the refusal to allow the contractors to furnish seven-eighths of that stone, or using only one-eighth as much, on which the Government witnesses testified they would have made a profit of $275,000, would be a loss to the contractor to that amount, wouldn't it?

A. It would seem as if the contractor lost through that." (Rec., 8511-12.)

"Q. Captain Carter testified that the object of these brush mattresses at Savannah Harbor was to catch the sand and silt which was constantly being brought down from the Savannah River and to hold that sand and silt till a sort of mound or solid collection of sand and silt would occur, upon which could be placed the stone to construct the jetty. Is that recognized by engineers as being one way of building a jetty?

A. It is in such places as the Savannah River, a river that is coming down from inland and going into an estuary before it goes out to the ocean." (Rec., 8514.)

COLONEL THOMAS H. HANDBURY, Corps of Engineers, when asked whether the use of multiple mattresses was a departure

from the terms of the contract, testified in Carter's favor, saying:

"A. I should not think so. I should think it was perfectly within the province of the engineer in charge, if he thought that construction would be best for the purpose under the contract, to authorize it to be done, provided the cost to the United States was no more than what was originally intended,—originally specified." (Rec., 3507.)

The Witness: *"Matters of that kind are usually left to the discretion of the Engineer Officer. He must have such latitude, or he would be constantly getting into trouble with matters of this kind."* (Rec., 3507.)

COLONEL W. L. MARSHALL, Corps of Engineers, when asked whether multiple sinking and construction was "in accordance with the terms of the specifications," testified in Carter's favor as follows:

"A. I think it is; if there is not any material change in the cost of those matresses, it was in accordance with those specifications, and allowable under them, in my mind." (Rec., 3168-69.)

"Q. Then if the Engineer Officer in charge should, upon experiment, find that the multiple mattress so built and put into the work, as a whole subserved the object of the contract, better carried out the work in hand, would he, or would he not, be justified in substituting the multiple mattress for a number of single mattresses laid singly?

A. I think, in my mind, not only would he be justified, but I think *he would be liable to censure if he did not.* I think it is his duty to use the best construction allowable under the specifications of his contract." (Rec., 3168.)

MAJOR F. A. MAHAN, Corps of Engineers, when asked whether the use of multiple mattresses was permissible under the contract, testified in Carter's favor as follows:

"A. I should say that was a question which was entirely within the discretion of the engineer." (Rec., 3056.)

When asked what he considered to be the duty of the officer, if multiple mattresses were found to be better for the work, Major Mahan said:

"A. His first duty is to his work, to save his work, and continue to vary his construction to suit changed conditions.

Q. And if he should find, as I have stated, that the multiple mattress so sunk is to the advantage of the Government, what would be his duty in that behalf?

A. If I were in his place, I should certainly use it." (Rec., 3056-57.)

COLONEL JOSEPH H. WILLARD, Corps of Engineers, when asked whether the sinking of mattresses was a departure from the terms of the contract, testified in Carter's favor as follows:

"A. It seems to me it was justifiable. You may call it a change, following out the true intent and meaning of the specifications.

Q. If, in the opinion of the accused, that was a better construction for the Government, would he be justified under those specifications in adopting it?

A. I should think so, yes; that would be my opinion. I should not feel that I did anything wrong if I had followed such a course." (Rec., 3131.)

COLONEL W. T. ROSSELL, Corps of Engineers, when asked whether such construction and sinking was permissible under the specifications to the contract, testified in Carter's favor as follows:

"A. I should think it would be, if the contractor agreed to it." (Rec., 2998.)

The Witness: "I think that could be done by agreement between the Engineer Officer and the Contractor." (Rec., 2999.)

"Q. I assume in my question that the fascines, that the extra fascines put in, more than compensate for the omitted poles?

A. Yes, sir; I understand that." (Rec., 2999.)

MAJOR C. McD. TOWNSEND, Corps of Engineers, when asked whether or not mattresses could be sunk in multiple under the specifications, testified in Carter's favor as follows:

"A. I should consider that if the Engineer Officer desired multiple mats under that contract, that he had authority to do so, provided the contractor would consent. I should not think under that contract that an engineer could force a contractor to build a multiple mat; but if he could prevail upon him to do it, I should consider he has power to put in a multiple mat." (Rec., 2949.)

"Q. You never saw a multiple mat put in in your life,

calling multiple mats these mats that Mr. Rose questioned you about?

A. Oh, yes, I have put in almost millions of yards of multiple mats.

Q. Since the court martial?

A. Since the court martial.

Q. Never up to the court martial?

A. Never up to the court martial.

Q. But you have since?

A. I have since.

Q. Did you put in your specifications when you let them that a mat could be put in in courses?

A. My specifications called for mats in single layers, very similar,—

Q. But the mats could be put in in layers?

A. They are quite similar to the Carter specifications in that respect." (Rec., 12239.)

"Q. Was there anything said in those contracts with reference to multiple mats?

A. Nothing.

Q. Did you take the description there to mean a unit for measurement, or that it was binding upon you to put in only a single mat?

A. I did not consider it binding upon me to put in only a single mat. The way I looked at the matter—this was a description that had been carried down in specifications for some 20 years, and this was a much better way of doing it, than putting up a series of single mats, so I allowed the contractors to do it." (Rec., 12242-43.)

Major Thomas H. Rees, Corps of Engineers, who was Captain Carter's assistant, when multiple mattresses were first constructed, and who is now a professor in the United States War College, testifies in Carter's favor as follows:

"A. *I have examined the specifications. I saw nothing there which forbids the sinking of the mattresses as multiple mats, and nothing which requires them to be sunk singly.*" (Rec., 2847.)

The Witness: "I remember that the sinking of single mats, each loaded with stone, gave considerable trouble on account of sinking into the soft bottom of the Savannah Harbor in the lower reaches.

Q. For what purpose was the multiple mat, loaded with stone adopted?

A. That was adopted after considerable discussion. I

remember at the time, I talked with Captain Carter, or he spoke to me about it, trying to devise some scheme to prevent that excessive sinking, and finally the multiple mat was tried, with the load of stone on top, instead of the single mats, each with a load of stone, and on top of that, another mat." (Rec., 2848.)

The Witness: *"The multiple mat was devised to avoid sinking in the mud."* (Rec., 2849.)

"Q. Can you, from your experience in this District, from any estimate of the relative cost—the relative actual cost of a multiple mat, as constructed during your tour of duty here, and the cost of the same number of single mattresses?

A. I think I can. I should say that, so far as the construction of the mattresses alone goes,—and not putting them into the works—that *it would cost more to build the multiple mattresses than to build the single mattresses separately and use them separately,* so far as the construction on the mattresses goes.

Q. Why?

A. In building the multiple mattress, the brush—as the mattress proceeds the brush has to be lifted to a greater height, and carried over a rough surface which the lower mattresses form, which makes a very poor road for walking over; the brush catches the clothes, etc.

Q. Then, with respect to the amount of wire necessary to bind the multiple mat together, as compared with the amount of wire used in the same number of single mattresses?

A. There would be a larger quantity of wire necessary in a multiple mat than in a single mat, because the separate courses have to be bound.

Q. With respect to the necessity of solidity, and more careful packing of the fascines, and the more careful binding together with wires of the greater mass, as compared with the same number of smaller mattresses; would there be any increased cost in that regard?

A. I should think the larger mass of multiple mats, would have to be more rigidly and strongly constructed than the single mattresses, in order to handle it, and hold it together while being launched and sunk." (Rec., 2850.)

The Witness: *"I think, as they have been used, that the multiple mattresses have been used with good reasons,*

and their value to the Government has been greater than an equal number of single mattresses each loaded with stone." (Rec., 2850.)

With respect to the *method of sinking,* MAJOR REES was asked and testified:

"Q. That is a method of the contractor, is it not?

A. That pertains to the contractor, and is a method he has a perfect right to adopt, provided it is in accordance with the specifications.

Q. Provided he gave work in accordance with the specifications, and the United States got what it contracted to get, even if the contractor could provide a cheaper method, that is no concern of the engineer office?

A. That is the province of the contractor, I think." (Rec., 2851.)

MAJOR REES testifies with regard to the inspection of the work by Colonel Craighill, the Division Engineer, when the multiple mats were first devised:

"Q. Did you ever see him down here?

A. I did, frequently.

Q. *Did he examine the work down here?*

A. *Yes, sir; he went over it a number of times; he examined it very closely.*

Q. Do you know of your own knowledge that he made himself familiar with the work as it went on?

A. I believe he did. It was discussed while he was going over the work. I went with him and Captain Carter on several occasions when he was making his inspections, and the work going on was the constant topic of discussion and conversation.

Q. Were those inspections superficial or thorough?

A. *I considered them to be quite thorough.*

Q. Do you know of your own knowledge whether General Craighill, then Colonel Craighill, ever saw any of these mats or heard their construction discussed?

A. I don't remember that he saw any actually going into the work, but *I remember their use was discussed and explained to him. I remember being present on Savannah Harbor when the use of the multiple mat was discussed and explained to him, and he asked a number of questions concerning it.*" (Rec., 2852.)

The Witness: "I know that the Division Engineer (Colonel Craighill) was interested in the work down there, and had inspected it, and knew the character of the work

that was going on, and was in accord with Captain Carter's idea of it. I have heard him commend the work, and *he stated to me on one inspection that I was very fortunate to serve in a District where such important works were being carried on under such an able and energetic officer as Captain Carter.*" (Rec., 780.)

GEORGE Y. WISNER, a civil engineer of great experience, testifies in Carter's favor:

"Q. I will ask you as an engineer, in construing the Cumberland Sound and Savannah Harbor contract under these specifications, *is a multiple mat within the meaning of the specifications?*

A. *It is.*" (Rec., 2614.)

The Witness: "It is immaterial, as long as a contractor puts the work in place as required by the specifications, whether he puts it in at once, or piece meal." (Rec., 2731.)

The Witness: "I don't think there is very much difference in the actual cost, only so far as the amount of stone that would be required to sink it, and that would be a saving to the Government." (Rec., 2731.)

Referring to the *single mattress of military fascines*, which Gillette had constructed and brought to Savannah, Mr. WISNER testifies:

"Q. Could this Savannah River work have been carried out by the use of mattresses similar to the one on the barge across the river, to a successful termination?

A. That is rather a difficult question to say. I have doubts, myself, whether it could or not; but I am quite certain—admitting that it could have been carried out—*it would have cost at least a million dollars more than it did.*

Q. *The use of such mattresses as that on the barge across the river would have cost the Government at least a million dollars more than the work has done?*

A. *Certainly; a mattress of that kind, putting in individual mattresses, required stone for each mattress in sinking. In doing that, you would have added to the cost per linear foot a very heavy percentage. The additional weight would have caused settling in the soft bottom, in all probability; and the character of the mat itself is not adapted for catching silt. The work which has been put in,—that is, the multiple mattresses—is well adapted for the purpose.*" (Rec., 2626-27.)

LYMAN E. COOLEY, a prominent civil engineer of Chicago, testifies in Carter's favor:

"Q. Captain Carter testified that the object of putting these brush mattresses into Savannah Harbor was this: that the river was a silt and sand bearing stream, which brought down large amounts of silt and sand from the upper regions of the river, and that if he sunk these mattresses, especially in multiple, in the river, that they would almost immediately fill up with sand and silt and produce a solid mound of sand and silt and brush that would be permanent, and that that could be loaded with additional rock and produce strong and permanent walls to accomplish the result desired; would that in your experience be the fair and reasonable thing to do?

A. That would be the rational thing.

Q. And if that was done and followed by the fact that the work was a great success, you would consider that he was entirely justified in doing that kind of work, would you not?

A. The means must be adjusted to the ends to be obtained; *the object to be gained is the major premise in this contract*, and I should say under the contract he was justified in making any modification that the experience in the work would justify, provided it did not change the nature of the work as a whole.

Q. In that regard, if by experiment he found that by sinking one mattress at a time with a load of stone on it, that he was loading down the structure too heavy, and then that he required the contractors to build the mattresses eight at a time, and then sink them with the same amount of stone that it would only take to sink one, would that be justified under the circumstances and under the contract?

A. If that state of facts existed, *it would be his duty to make the change.*

Q. Well, if the contract is silent, as it is, as to whether he should sink those mattresses one at a time, or eight at a time, would he be justified, under that contract, according to your experience as an engineer in sinking them eight at a time?

A. I think so.

Q. He has testified that he has figured up exactly what mattresses were sunk and how much stone it took to sink them, and that by this change of sinking eight

at a time instead of sinking one at a time, that he saved to the Government $737,500 on stone which Greene and Gaynor had a contract to furnish, would that change under those circumstances, if it was a change in the contract, be a justifiable change on his part?

A. Yes, sir, if the contractor would consent to it.

Q. And he has also testified that the amount of stone thus saved, reckoned at the price or profit which some of the Government witnesses claim that Greene and Gaynor would have made from that stone, would have given them a profit of $275,000, if they had been allowed to put the stone in. I will ask you whether or not his requiring them to sink the mattresses eight at a time instead of one at a time, and thus depriving them of their profits of $275,000 on that stone, which otherwise they would have been put in, would be considered by engineers generally as a breach of duty on his part with the United States?

A. Why, if he could have the contractor do it, it was an excellent thing to do.

Q. Upon that state of facts he would save to the United States $737,500, and Greene and Gaynor would lose the profits on that stone of about $275,000, taking nothing else into consideration?

A. Yes, sir, unless there was an equivalent of brush or other material used.

Q. I have already called attention to the facts that experiments which he says he made showed, if he put all the stone in a load on each mattress, that he would not have gained more than about half as much height as he would if he had put the mattresses in eight at a time, and put single loads on each, that would have been of vast benefit to the United States to sink those eight at a time, instead of one at a time.

A. Certainly. The general idea of mattress work is to omit all the weight possible and to utilize all the silt possible in lieu of the weight, so as to make a solid mat, and anything that would work in that direction would be beneficial and justified, provided it did not change the terms of the contract as a whole or substantially." (Rec., 8539-41.)

L. Y. Schermerhorn, an experienced civil engineer and President of the American Dredging Company (who was an unsuccessful bidder on the big contract), when asked whether

a change from sinking mattresses singly to sinking them in multiple was permissible, testified in Carter's favor:

"A. I think such change would be permissible under the specifications." (Rec., 12437.)

J. W. Rutherford, an experienced civil engineer and contractor, when asked whether a multiple mattress was permissible under the contract of 1896 for Cumberland Sound (wherein the mattress specifications are practically the same as at Savannah), testified in Carter's favor:

"A. Most undoubtedly.

Q. In your opinion as a contractor, was such a construction permissible?

A. I make the same answer, sir." (Rec., 12884.)

That contractors, who were competitors of Greene and Gaynor, understood the mattresses could be sunk either singly or in multiple, under the contract, is shown by the following testimony, and there is no testimony to the contrary:

P. Sanford Ross, an unsuccessful bidder on the big contract, testifies in Carter's favor:

"A. * * * We got the specific explanation at that time that we could use this multiple mattress." (Rec., 12919.)

"Q. You say that from the information you had you knew how that mattress work was to be done?

A. We knew these multiple mattresses would be used, although they claimed that Gaynor had a patent on the method of arranging, etc., but I didn't consider that as being an obstacle in the way." (Rec., 845.)

That Carter did not help Greene and Gaynor by making them sink the mattresses in multiple is shown by the testimony of W. F. McCauley, an unsuccessful bidder on the big contract, who is now a witness for the complainant. McCauley testifies:

"*It is cheaper and better in the river, for a contractor, to build the mats one at a time, and not on top of each other.*" (Rec., 1013.)

J. W. Rutherfoord, a competitor of Greene and Gaynor, testifies in Carter's favor:

"A. The Captain told me that it might be necessary to put, instead of hauling one of the mats out singly, it might be necessary to put several courses of mats.

Q. One on top of the other?

A. I understood so.

Q. And did you understand from the specifications themselves that he had the authority to compel you to do that?

A. Undoubtedly.

Q. You understood it at that time?

A. Undoubtedly, at that time." (Rec., 3156.)

A. R. STEWART, a competitor of Greene and Gaynor, testifies in Carter's favor:

"Q. Were you informed whether or not you might build those mattresses more than one at a time?

A. I don't understand your question. If it means that we could build one layer on top of another instead of laying the layers singly, we might lay them as they had been laid before, we understood that we could do that way. We intended to build and launch our mattresses the same as the present contractor, who had done work previously, had done." (Rec., 650.)

The Witness: "I am not sure that I understand your question, except this, that we based our estimate on making them and launching them as had previously been done, that it was not imperative as to the manner they should be launched, whether singly, or as had been done before." (Rec., 651.)

"Q. If that had been written out in your specifications would it have made any change in your bid?

A. No, sir, because we based our estimate on the understanding that we could lay them singly or as they had been previously laid, just as suited ourselves." (Rec., 651-52.)

E. L. FRIDAY, a competitor of Greene and Gaynor, testifies in Carter's favor:

"In sinking mattresses, deponent naturally expected, where practicable for any design, to sink as many on top of one another as were required, that being in deponent's judgment the proper way of sinking them." (Rec., 996.)

RODERICK G. ROSS, a competitor of Greene and Gaynor, testifies in Carter's favor:

"I understood that we could build one mat on top of another if we wished, in exactly the same way as before, and figured accordingly." (Rec., 8793.)

R. F. Ensey, the inspector in actual charge of the work, when the method of multiple sinking was first devised, testifies concerning the necessity for sinking in multiple:

"Q. When you were there on the work, on that training wall down there, what was the result of weighting each layer of the mattress with stone?

A. *The wall was on soft bottom, and very frequently that extra weight, any unusual weight on the wall, would cause the sinking of the mat into the bottom. I remember it became a problem in my mind and in Captain Carter's, to design a mat that would not sink into the mud; in other words, to get the altitude, to get the height, without any more weight than would be necessary to keep the mat in position; and after that we used a double course mat, and a single course mat. I think I went to Captain Carter's room at night to confer with him on the progress of the work, and he was on the work sometimes twice a day.*" (Rec., 522-23.)

Marion Twiggs, an employe of Captain Gillette, and a witness for the Government, testified that even *he* understood the specifications to mean that the mattresses should be sunk in multiple:

"Q. Under the supecifications, and under the contract how did you understand that these mats should be placed in the jetties,—one by one and weighted down, or several bundled together and tied together, and all in one mass?

A. Several tied together in one mass." (Rec., 1162.)

For further details, see (Rec., 3596-99; 3644; 8048-52; 8102, etc.).

There is a minor contention by the complainant, which is that the building of multiple mattresses, with different widths for the different courses, producing what are known as "steps," on the sides of those mattresses, caused the height to increase with the number of steps, so that an 8-course mattress in, say 4 steps would be higher than an 8-course mattress in 2 steps, etc.

The contention is entirely without merit, because the grillage poles resting on the steps, from which it is claimed the increased height came, did not extend underneath the mattresses at all, but rested simply on the tops of the steps, to hold down the fascines which were exposed there. (Rec., 13009.)

In fact, a multiple mattress of a certain number of courses, and containing only 2 steps, was sometimes higher than a mul-

tiple mattress of the same number of courses, but containing 3 steps. (Rec., 8773.)

The varying height of the mattresses (with the same number of courses) came largely from the different degree of wave action, or pounding, to which the mattress barges had been subjected, while the mattress was being towed to the place of measurement and use. The entire matter is explained on pages 8772-73 of the record.

The complainant suggests that multiple mattresses ought to have been required specifically by the contracts, if they were to be used, but there were powerful reasons why that ought not to have been done.

In the first place, the engineer should have discretion to use mattresses, *either singly or in multiple*, as the best interests of the work required, just as the specifications directed Carter to do; in the second place, no one knew that mattresses could be sunk in multiple, until the Gaynors discovered a method of doing it, which they at once patented. (C. M. Def. Ex. 45.) (Rec., 8756.) (Rec., 605.)

COLONEL W. T. ROSSELL, Corps of Engineers, testifies:

"Q. The question has been asked by the Judge Advocate here, if the Engineer Officer in this district desired to use mattresses of this character, that construction, why he did not specify in his contract the multiple mat, as described. If it should appear that one particular contractor who had done considerable business in this district had filed a caveat in the Patent Office looking towards securing a patent on the method of launching these heavy mattresses, I will ask if that would have any influence on you as an Engineer Officer in putting in, or omitting to specify distinctly, that you intended to use multiple mattresses?

A. I don't think I would bind myself to anything that was patented. I think I would specify things that were not patented." (Rec., 2999.)

COLONEL W. L. MARSHALL, Corps of Engineers, testifies:

"Q. If you had had experience in the use of multiple mattresses, and had it in view to continue their use, would you not place it in the specifications calling for contracts for mattress work?

A. I don't think I would, Colonel Barr.

Q. Why not?

A. Simply because, if I did use multiple mattresses,

of two courses, or three courses, or five courses, I would have to describe each one separately and reiterate the description, and get separate bids on each mattress.

Q. Would that be very difficult?

A. It would not be objectionable, but I simply say that I would not advertise that way. I would advertise that it had to be upon a given unit of measurement in square yards." (Rec., 3180.)

MAJOR C. MCD. TOWNSEND, Corps of Engineers, testifies:

"Q. Suppose it to be a fact that a certain contractor had filed a caveat or secured a patent on a method of launching multiple mats, would you, in your specifications, call for multiple mats?

A. I should try to avoid it, without I was in collusion with the contractor. I myself should avoid specifying a thing which was covered by a patent that only one man could do." (Rec., 2949.)

The Witness: "It would place the contract in the power of the man who had the patent; nobody else could well afford to bid on it." (Rec., 2949.)

The Witness: "It would give the man who had the patent the absolute dictation of the construction of those mats, and the price to be paid for them.

Q. What would be the effect on the bid? Would it be to raise or lower the price?

A. Unquestionably, to raise the price." (Rec., 2950.)

When the big contract of 1892 was let, no brush-fascine mattresses had ever been sunk in multiple.

MAJOR F. V. ABBOT, United States engineers, testifies as a government witness with regard to the difficulties of sinking brush-fascine mattresses in multiple, as follows:

"A. I never saw it; the attempt was made to do the same thing at Charleston, but it failed." (Rec., 814.)

MAJOR C. MCD. TOWNSEND, United States engineers, testifies concerning the difficulties of sinking mattresses in multiple:

"A. Until I saw this patented arrangement here (the device patented by the Gaynors), I should have considered it rather impracticable." (Rec., 2983.)

The big contract at Savannah was let on October 22, 1892 (Ex. 78). The first brush-fascine mattresses ever sunk in

multiple were put in under that contract in February, 1893. (Rec., 8049, *et seq.*) (See also Def. Ex. 150.)

The reasons for sinking those mattresses in multiple have already been given herein.

O. M. CARTER testified before the court martial concerning the *methods* employed in order to sink mattresses in multiple:

"A. * * * We started in then to build two mattresses, one on top of each other, to save that intermediate load of stone. * * * This was very difficult and finally became impossible, on account, as I said, of the very low flotation of the mattress. I then requested the contractor to see if he could not build his mattresses on ways, built on his barges, so that instead of building his mattresses near the brush camp, and towing them down as mattresses, he should tow down the fascines on the brush barges, and then build the mattresses in place. He tried that, and was able to build the mattresses, I think as many as four courses in that way, building them off the end or side of the barge, practically a continuous mattress. * * * But that work became very difficult on this river, on account of the swell of passing steamers, and on account of rough water, * * * and finally the contractors declined to build them that way any more." (Rec., 3597.)

"A. * * * I then attempted to have the contractors build them in sections, on sloping ways, of thicker than four courses, and then launch the mattress as a whole. * * * He tried that, but the trouble was that very often the mattress would slide off before we got ready to have it go, and he would lose it, and then sometimes * * * he would be two or three days in getting it off, and he was very much dissatisfied with that.

Various methods were tried to get the mattress off, and finally a longitudinal bulkhead was used in his mattress-barge, and valves placed in on one side, so that one side could be filled and tip the mattress; but that was unsatisfactory, because you never could tell when the mattress would go. Sometimes it would take one inclination, and sometimes a good many degrees more, and it needed a sudden jar to start the mattress.

That method was tried, and a great many others also,

until finally one of the employes, or members, of the Atlantic Contracting Company devised a system of tripping ways, which, by releasing a rope or a trigger on one side of the barge, the whole ways would be tipped and the mattress launched. That method enabled them to sink them in those courses as I desired." (Rec., 3598.)

That device, which was the only practicable method of sinking mattresses in multiple, was patented by the Gaynors, the letters patent being attached to the courtmartial record as Defendant's Exhibit, No. 45, which is in evidence in this case.

CARTER testifies as to the *object* of multiple mattresses:

"A. * * * The idea in the Savannah river was *to build the entire dam at once,* if I could, so as to get no more stone on it than was absolutely necessary; so I built the number of courses necessary to bring it up to the height I desired, if I could do it." (Rec., 3599.)

R. F. ENSEY, a civil engineer, who was the inspector for the United States when those multiple mattresses were first devised in February, 1893, testifies:

"A. The wall was on soft bottom, and very frequently, that extra weight, any unusual weight on the wall, would cause the sinking of the mat into the bottom. I remember it became a problem in my mind, and in Captain Carter's, to design a mat that would not sink into the mud * * * and after that we used a double-course mat, and a single course mat." (Rec., 522.)

MAJOR T. H. REES, United States engineers, who was Carter's assistant when the multiple mat was first devised, testifies to the same effect. (Rec., 2849.)

O. M. CARTER testifies further concerning multiple mats:

"A. * * * *If you can put your dam in all at once,* of course it is very much better. * * * If you can put in your structure quickly, and stop the flow through, and the consequent underscour and settlement, *the saving is very great to the United States.*" (Rec., 3644.)

To put the entire dam in at once required that the number of courses should vary with the depths, and those depths changed from day to day, depending on whether the work caused a scour or a fill. For example, by referring to Defendant's Exhibit No. 150, page 27, it will be seen that on the "Cockspur Island Training Wall," mattresses of only two

or three courses were required on October 12th, 1894, while on the same work on the very next day, a mattress of ten courses was required, but three days later, on the same work, a mattress of only two courses was required!

Such changes as those necessitated very frequent orders from the inspector to the contractor as to the character of the mattress desired.

When a mattress of special shape was needed, an inspector was sometimes sent to supervise its manufacture, and on this head, Campbell Ford, a civil engineer and the United States inspector at Savannah, testifies:

> "A. * * * We wanted a special mat made for the end of the wall, and wanted steps on the three sides instead of one side, and Mr. Cooper considered it advisable that I should go up and superintend, and see that it was made correctly." (Rec., 12952.)

The criticism which seems to be made of Carter's action is that after he found it to be a good thing to sink mattresses in multiple, he did not call specifically for multiple mattresses in the contracts which were let after the spring of 1893, and Col. G. L. Gillespie asked Carter before the board of engineers:

> "COL. GILLESPIE. Could you not have stated in the specifications that the mattresses might be built in courses of eight, separated by grillages?" (Rec., 553.)

Mr. Erwin seems to adopt Colonel Gillespie's criticism, by quoting Gillespie's question to Carter at page 8755 of the record.

The undesirability of specifying in advance the multiples of mattresses to be used, is shown not only by Defendant's Exhibit No. 150 (which shows it to be impracticable), but by the testimony of Colonel W. L. Marshall, United States engineers.

COL. W. L. MARSHALL, United States engineers, who was then in charge of Chicago Harbor, testifies specifically on this subject before the courtmartial, as follows:

> "Q. If you had had experience in the use of multiple mattresses, and had it in view to continue their use, would you not place it in the specifications calling for contracts for mattress work?
>
> A. *I don't think I would, Colonel Barr.*
>
> Q. Why not?
>
> A. Simply because if I did use multiple mattresses (of

two courses, or three courses, or five courses) I would have to describe each one separately, and reiterate the description, and get separate bids on each mattress.

Q. Would that be very difficult?

A. It would not be objectionable, but I simply say that *I would not advertise that way. I would advertise that it had to be upon a given unit of measurement, in square yards.*" (Rec., 3181.)

LYMAN E. COOLEY, a very prominent civil engineer of Chicago, testifies that the engineer must have great discretion, if he is to succeed. (Rec., 8560-61.)

GENERAL WILLIAM LUDLOW, United States engineers, testifies to the same effect. (Rec., 3008-09.)

O. M. CARTER gives another reason why it would have been improper to call for multiple mattresses in the contract of 1894 at Cumberland Sound, saying:

"A. * * * Prior to the work done under the contract, no person believed that the method which we used in Savannah river could be used on an ocean bar, and consequently an engineer would have been subject to severe criticism if he called for a method which contractors might not have been able to use, because he would necessarily have increased the prices bid enormously.

Q. As a matter of fact, it appears that all these brush mattresses were put into Cumberland Sound, under the contract of 1894, in multiple form?

A. That is true; but in advance of that, no engineer knew that that was possible; and in the face of the fact that contractors thought it impossible, it would have been the height of folly for an engineer to have specified that multiple mattresses should be used on an ocean bar, in advance of the test to see whether they could be used." (Rec., 8756.)

CARTER gives another reason why multiple mattresses ought not to have been called for under the contracts of 1896, namely, that the Gaynors had patented the only feasible method of sinking mattresses in multiple. (Rec., 8385.)

COL. W. T. ROSSELL and MAJOR C. McD. TOWNSEND, United States engineers, both testify that it would have been improper to have called for a patented method of doing contract work. (Rec., 2949, 2999.)

Mr. Erwin says that it was unfair not to require bids on

multiple mattresses, because Greene and Gaynor knew that multiple mattresses might be used, while other contractors did not.

Let us examine Mr. Erwin's assertion: The only competitors of Greene and Gaynor who bid on the contract of 1894 were *Roderick G. Ross* and *Rittenhouse Moore.* (Rec., 13247.)

Roderick G. Ross testifies that he knew the contractors might build and sink the mattresses in multiple if they could, saying:

> "Deponent knows how the brush fascines and mats *were to be built* at Cumberland Sound under the contract of 1894, and they are alike in all respects to those *to be built* under the contract let in 1896. * * * The mats at Cumberland Sound were built on top of one another. * * * Deponent fully understood how the mats were to be built and sunk before the bidding at Cumberland in 1896. * * * Deponent was upon the occasion of this bid given full and free information of all facts required by him." (Rec., 1019.)

Rittenhouse Moore did not testify on the subject at all.

The only competitors of Greene and Gaynor who bid on the 1896 contract at Savannah and Fernandina were *P. Sanford Ross, Jacob Friday & Sons, and John L. Grim.* (Rec., 13240, 13248.)

P. Sanford Ross testifies concerning the bidding on the 1896 contract as follows:

> "A. * * * We got the specific explanation that we could see this multiple mattress." (Rec., 12919.)

E. L. Friday, of the firm of Jacob Friday & Sons, testifies concerning the bidding on the 1896 contracts:

> "In sinking mattresses, deponent naturally expected, where practicable for any design, to sink as many on top of one another as were required, that being, in deponent's judgment, the proper way of sinking them." (Rec., 996.)

John L. Grim testifies that when he went to bid on the 1896 contracts, he was told that the mattresses to be used

> "would be built and sunk as before, if the contractors could do it, several mats on top of one another at once." (Rec., 1009.)

There are many other competitors of Greene and Gaynor who testify in the same way, but as they did not actually bid on the work in 1894 or in 1896, their names have not been given here.

For further details, see (Rec., 605.) (Rec., 8385.)

—12—

MATTRESSES WASHING OUT.

The testimony of Hale is found on pages (Rec., 2491-92; Rec., 2511-15) of the court martial record.

The testimony of Majors Townsend and Rees, Corps of Engineers, and of Mr. Wisner, is found on pages Rec., 2628; 2833-34; 2937 of the court martial record.

For evidence that the work was in good condition after Carter left, and that if anything occurred afterwards to injure it, the cause was to be found in Gillette's refusal to load the unfinished work with stone, as the project required him to do, see Reference herein No. 19.

See, also (Rec., 8186-91).

—13—

THE OMITTED GRILLAGE POLES.

The contract, under which the harbor work at Savannah was done, described one type of saw-log mattress, and two types of brush-log mattresses, on which bidders were required to base their prices for the work to be done. (Ex. 78; §38.)

The two types of brush-log mattresses set forth a certain amount of brush, to be compressed into bundles, which were called "fascines"; and a certain amount of poles used to bind those fascines into rafts or "mattresses," which were called "grillage poles"; and the necessary wire, etc., required to bind the brush and poles together into mattress form. (Ex. 78; § 38.)

For evidence that the open lattice work between adjacent mattresses required the omission of some of the grillage poles, when mattresses were sunk in multiple, see (Rec., 8057-58).

In order to provide the requisite flexibility in construction,

the contract expressly authorized the Engineer Officer in charge

> *"to increase or decrease the relative quantities of all materials, after due notification to the contractor, without any change in the contract prices* (Ex. 78; § 49);

and the contract further provided that

> *"the decision of the Engineer Officer in charge as to quality and quantity shall be final."* (Ex. 78; § 32.)

The contract thus expressly gave to the Engineer Officer in charge the power to increase or decrease the relative quantities of "fascines" and "grillage poles"; (without any change in the contract prices), so that he might not be hampered, in executing the very difficult work he was called upon to perform, by demands of the contractor for "extras," as often occurs.

Concerning the necessity for giving that power to the constructing engineer, two very able engineers testify in this case.

LYMAN E. COOLEY, a prominent consulting civil engineer of Chicago, testifies concerning the contract under which the harbor work at Savannah was done:

> "The contract, as I read it, calls for material which might vary widely; the construction might vary widely, according to the conditions and requirements of the work; and there are mentioned three types of mattress. *As I read the contract, it might vary anywhere between those several types, the design being to give greater elasticity in the carrying out of the work, and enable conditions to be met as they developed, and take advantage of any improvement in the state of the art, as the work progressed. That is the way I would construe that contract; the object being to accomplish the work itself; all other things are accessory to that."* (Rec., 8537.)

GENERAL WILLIAM LUDLOW, Corps of Engineers, testifies:

> *'When it comes to the details of the work, you must not, when you put a man in charge of a very difficult enterprise* (one involving all the abstract laws of hydraulics, most of which are down out of sight and of which he knows the force and difficulties), *restrict him too much. He has got to set his brains, professional knowledge, energy and ambition, against these forces.*

When he is engaged in the struggle with them, don't hamper him too much. Let the contracts be drawn so that a liberal professional discretion is given him, and in construing the contract, let it be understood the same way." (Rec., 3008-09.)

When mattresses were sunk one at a time, the exact proportions of grillage poles and fascines set forth in the mattress types were necessary and were used; but when the mattresses were sunk more than one at a time, the contractor was obliged to bind the separate mattresses together with wire, in order to hold them in place until they were sunk. It was necessary, under such method of sinking, to diminish the quantity of grillage poles (which produced open, lattice-like, or crib work between the mattresses when those poles were left in), and to increase the quantity of brush fascines. (Rec., 8056-58.)

That gave a more compact structure, through which the water could not flow freely, and was of great value to the work, because it facilitated the collection of sediment, etc.

The specifications expressly authorize the engineer in charge to "*increase or decrease the relative quantities of all materials*" (Ex. 78; § 49), and the work was benefited by the use of more brush and less poles.

Colonel W. H. Bixby, United States Engineers, testifies in Carter's favor that omitting the poles and putting brush in place thereof was a benefit to the work, saying:

"Q. *In using brush mattresses purchased by the square yard, which was considered the most valuable and most useful in stopping sand and silt, the grillage poles or the brush?*

A. *The brush.*" (Rec., 8508.)

Alexander E. Kastl, member of the American Society of Civil Engineers, an engineer of large experience in harbor work, who constructed the great works at Tampico, Mexico, etc., testifies in Carter's favor:

"A. *Well, the grillage poles are simply used to keep the fascine or brush work together until it is placed in the work. It is simply a binding to keep the brush work in position until it can be placed in the work and stone placed on top of it. After the brush is secured in the work, the binders are of no use.*

Q. After the mattress is secure in place, what is the

valuable constituent of such a mattress, the poles or what?

A. The brush.

Q. The brush itself?

A. The brush, and stone that is put on the mattress.

Q. I speak now only of the mattress; what is valuable?

A. It is just the brush, not the poles." (Rec., 2821.)

GEORGE Y. WISNER, a civil engineer of great and successful experience in harbor work, testifies in Carter's favor:

"Q. What, in this multiple mat which you have been discussing, what effect would it have upon the efficiency of such a mat, say a 6 or 8 course mat, to omit one set of grillage poles between each pair of mattresses?

A. The taking out of one set of grillage poles, and leaving just a single one between each layer of fascines, gives just as good an opportunity for binding a mattress, and results in a much more pliable mattress, though there would be a few less poles in the construction.

Q. It being more pliable, would it be better or worse for construction such as we have been discussing?

A. Better adapted to the work." (Rec., 2664.)

"Q. What do you say with reference to the binder poles, as to what use they are?

A. None, after the jetty is made and consolidated?" (Rec., 12110.)

"Q. The substitution of brush for grillages is a departure from the terms of the contract, is it not, as you have read the contract?

A. No, sir, not under the discretion which is given in the contract." (Rec., 2725.)

The Witness: *"I don't see that there is a substitution of one material for another; it is simply an alteration of the quantities in the mattress.* A set of grillage has been left out, by which better construction is made, and in order that the same amount of material shall be in it, a brush fascine is substituted, is my understanding." (Rec., 2726.)

"Q. What, in this multiple mat which you have been discussing, what effect would it have upon the efficiency of such a mat, say, a six or eight course mat, to omit one set of grillage poles between each pair of the mattresses?

A. The taking out of one set of grillage poles, and

leaving just a single one between each layer of fascines, gives just as good an opportunity for binding a mattress, and results in a much more pliable mattress, though there would be a few less poles in the construction.

Q. It being more pliable, would it be better or worse for construction such as we have been discussing?

A. Better adapted to the work.

Q. In lieu of the one set of grillage poles you took out, you would substitute another fascine for each pole, you would substitute additional fascines in lieu of the grillage poles taken out; would that improve or diminish the efficiency of the mat?

A. It would be work just as much more as the percentage of brush you added.

Q. For brush is the essential in such construction?

A. Yes, sir.

Q. And if the additional fascines were substituted for the grillage poles without cost to the Government, would that be more or less valuable?

A. It would be more valuable.

Q. And would such a mat cost the contractor more or less?

* * * * *

A. It would probably cost them fully as much, if not more." (Rec., 2664.)

"Q. *How many fascines should you put in as compensation for the amount of a grillage to a layer?*

A. *I should not think that any was required. The mattresses are really better mattresses with the grillages out. If any extra fascines be put in there, it is that much advantage to the Government, that they have got so much brush.*" (Rec., 2764.)

The Witness: "The best constructed mattresses, where they have been made in this country, leave out all the grillages, and it is all solid brush." (Rec., 2761.)

The Witness: "At the Brazos, the mattresses I constructed were multiple mattresses, varying in thickness all the way from 10, or probably 6, to 15 feet thick, and 1,000 feet long." (Rec., 2761.)

Major C. McD. Townsend, Corps of Engineers, who has had large experience in brush mattress work, testifies in Carter's favor:

"A. * * * The whole object of grillage poles is to hold the brush in place.

Q. Not to increase the height of the mat?

A. No; I should not consider it so." (Rec., 12249.)

"Q. Now, if the engineer puts in two or more mats, one on top of the other, you think it would improve it, if he would not put in as many grillage poles?

A. *Leave every grillage pole out, unless he puts in stone so that he absolutely covers them with stone. He must do that, or else leave out every grillage pole he can.*

Q. That would make a better mat, if you were going to put them in in layers?

A. And take out the grillage poles, yes." (Rec., 12246.)

MAJOR THOMAS H. REES, Corps of Engineers, who was on the work when the multiple mats were first devised, testifies in Carter's favor:

"A. *I remember that at first intermediate grillages were required, until it was found they didn't work well where they were being used on work where it was necessary that they should follow closely to the bottom. The stiffness which the additional grillages gave it held it up in place, and allowed scouring under them; that was the assumption; of course, it could not be definitely determined. It was feared that the trouble was partly due to that, and finally these extra grillages were omitted, and it was required that an equivalent amount of brush be substituted therefor.*" (Rec., 2848.)

LYMAN E. COOLEY, a prominent civil engineer of Chicago, testifies in Carter's favor:

"Q. * * * I will, therefore, ask you as to whether or not that change of material from 4 inches in height of grillage poles, which it appears were omitted because they left a crib work between the mattresses, which allowed the water to go through and destroy the work, whether the change of the 4 inches in height of the grillage poles to 4 inches in height of brush, would not be an advantage to the work?

A. *It would be decidedly beneficial.*" (Rec., 8535.)

"Q. If in the performance of that contract, Captain Carter found by experiment that the leaving in of all these grillage poles required by the specifications, where he put down, say eight mattresses, produced a crib or lattice work in which the water rushed and destroyed and undermined the structure, would it not be his duty to omit those poles?

A. Surely. *The only object of those poles is to fasten the material together and keep it in place; if you can accomplish it without any poles at all, the mattress would be better for its purpose.*

Q. That is to say, the object of the brush mattress is to place it so it will obtain sand and silt, is it not?

A. Yes, sir. Thousands of yards of mattresses are used without any poles or anything of that nature, merely the weaving of brush in combination with wire.

Q. The object is to catch the sand and silt?

A. Yes, solely.

Q. And the poles are put on merely to hold the brush in place?

A. Yes, sir, to hold in place.

Q. And if he found that the poles would ruin the work, it was his duty to have the poles omitted?

A. Certainly.

Q. And if he placed on those poles an unequal volume of brush and the contract provided he might call for more brush than poles, it was his duty to put on more brush, was it not?

A. Yes, sir, it would be a better mattress." (Rec., 8546-47.)

"Q. *The contract authorizes the engineer in charge to take less brush or more poles, or more brush, without any change in the contract price, does it not?*

A. *It does.*

Q. And the only change between the specifications and the way the work was actually done, so far as the material was concerned, was the taking of four inches in height of brush in place of four inches in height of grillage poles, which grillage poles the engineer thought were injuring the work if he put them in?

A. The contract, as I read it, calls for material which might vary widely; the construction might vary widely, according to the conditions and requirements of the work, and there are mentioned three types of mattress. As I read the contract it might vary anywhere between those several types, the design being to give greater elasticity in the carrying out of the work and enable conditions to be met as they developed, and take advantage of any improvement in the state of the art, as the work progressed; that is the way I would construe that contract; the object being to accomplish the work itself; all other things are accessory to that.

Q. Would the fact that the work was admittedly a success, and as testified by the Chief of Engineers, who was chief at the time it was finished, and inspected it, was as fine a piece of work as had been done, would that tend to show that the acts and judgment of Captain Carter were justified by the circumstances?

A. It would be certainly *prima facie* evidence that everything was accomplished in the proper way.

Q. It would go to show, would it not, that the changes he made where he substituted four inches of brush instead of four inches of grillage poles was for the best interest of the work?

A. Undoubtedly; as I understand it the work was carried out successfully within the estimates, and that there is sufficient elasticity in the contract to permit any modifications that might be beneficial, as the work progressed and the modifications were resorted to, are not specifically described in the contract." (Rec., 8536-37.)

The Witness: "*The object to be accomplished, as in a war or battle, is the thing.*

Q. *That is what you say?*

A. *The instrumentalities are subordinate.*" (Rec., 8562.)

The complainant's solicitor now contends the grillage poles are the valuable part of the brush mattress; that they are for the purpose of giving height to the mattress, etc., but his contention is utterly without merit.

Major C. McD. Townsend, Corps of Engineers, testifies:

"Q. What office do the grillage poles serve in the construction of a multiple mat, such as I have described to you, the interior grillage poles?

A. Well, they would be mere binding poles, like the top ones.

Q. To hold the brush in place?

A. To hold the brush in place.

Q. Until it was put in the work, and loaded with stone?

A. Yes, sir; the whole object of grillage poles is to hold the brush in place.

Q. *Not to increase the height of the mat?*

A. *No; I should not consider it so.*" (Rec., 12249.)

For further details, see (Rec., 8056-58) (Rec., 3598-99).

It appears, therefore, that if the increase in the amount of brush was equal to the decrease in the amount of grillage

poles, the change in the relative quantities of grillage poles and brush *was not only in accordance with the specifications, but was a distinct advantage to the work.*

This question will be considered under Reference herein No. 14.

—14—

AMOUNT OF MATERIAL USED.

A full description and explanation regarding brush logs (fascines), their manufacture into mattresses, and their flattening out in the big 8-course mattresses is given in Request No. 14; hence it will not be repeated.

The evidence supporting the statements in Request No. 14 will not be given.

That the contract required the fascines to be only 9 inches in diameter, as placed into single mattresses with no pressure on them, see (Ex. 78; § 38).

The contract covering the questions involved is Exhibit 78; § 38 and § 39.

When 8-course mattresses were built and sunk under the big contract at Savannah, they were required to be 12 feet in height. (Rec., 8067.)

At Cumberland Sound, in 1896, owing to a different arrangement of the grillage poles, they were required to be 9 feet and 9 inches in height. (Rec., 8185, 8338.)

The testimony of A. S. Cooper, a witness for the Government, is that the required mattress heights were fulfilled throughout the big contract at Savannah.

A. S. COOPER testifies of the work done under the big contract:

> "A. I inspected probably about nine-tenths of the material that went into that work." (Rec., 10916.)
>
> The Witness: "I was given by Captain Carter a list of the heights that would be required when multiple mats were put in, * * * and that list was my guide for the entire construction of the entire work of the contract." (Rec., 1174.)
>
> The Witness: "The first course will be 2 feet in height; that is, an average height of 2 feet by taking several measurements, 6 or 7 measurements all over the mat, and the average must be 2 feet; second course mat 3½ feet; fourth course mat 5 feet; a five course mat 7½ feet;

a six course mat 9 feet; a seven course mat 10 feet; an eight course mat 12 feet." (Rec., 1175.)

The Witness: "*Suppose a mat was delivered to be one of 7 courses. This table says it must be 10 feet high. suppose that mat was only 9 feet high; instead of being allowed for a 7 course mat, they would only be allowed for a 6 course mat.*" (Rec., 1175.)

The Witness: "*I carried these instructions out throughout the entire contract.*" (Rec., 1198.)

Cooper reported in writing concerning a specific mattress:

"I examined the mat carefully. * * * I found *the material in the mat was good, and there was apparently plenty of it.*" (Rec., 1223.)

The testimony of MARION TWIGGS, a witness for the Government, is that the mattresses at Cumberland Sound were better than those at Savannah. (Rec., 1154.)

The heights of the mattresses actually put in at Cumberland Sound, showing that the 8-course mattresses sunk there while Captain Carter was in charge actually averaged 9 feet and 9 inches in height are to be found in (C. M. Ex. 8). See also (Rec., 8338, 8777).

One of those eight-course brush-log mattresses weighed, according to the Government's own witnesses, as much as two hundred tons, or an average of twenty-five tons to the mattress.

A. S. COOPER, a witness for the Government, testifies concerning the multiple mattresses used at Savannah:

"A. * * * Those mats were very heavy, and would sometimes weigh 150 to 200 tons." (Rec., 454.)

As Cooper was a hostile witness against Carter his statement of 200 tons will be taken.

Two hundred (200) tons for 8 mattresses in an average of 25 tons for each mattress, hence the bottom raft (mattress) would have one hundred and seventy-five tons on top of it, the next raft would have one hundred and fifty tons, and so on.

It is a matter of common knowledge that four-inch pine poles, under such tremendous pressure (especially as they were six feet apart), would not amount to much in adding any height to the structure, except at the top, where there was no weight on them. Hence, all the shrinkage due to that pressure had to be made up with brush logs.

The complainant contends that 14 rows of grillage poles

were used in the 8-course multiple mattress at Savannah; and that 18 rows were omitted.

That Captain Carter required Greene and Gaynor not only to replace the omitted grillage poles with an equivalent of the more valuable brush (Ref. 13), but required them to put into the work much more material than their contract called for, is shown by the following testimony:

COLONEL W. H. BIXBY, Corps of Engineers, testifies in Carter's favor:

"Q. (Mr. Stone.) I will now call your attention to the contracts and specifications known as the big contract at Savannah of October 22, 1892. The witnesses testified that no log mattresses mentioned in that contract were ever put into the work under the big contract, and they also testified that only a trifling amount of what is called the second design of mattress was put into the work under the big contract; so that practically all of the work under the big contract, so far as mattress work is concerned, was of the third design. I will ask you to state what would be the volume of 4-inch poles called for by the specifications for the third design of mattress, which is the one that was put into the work under the big contract at Savannah? You may assume in your calculations that the poles were 4 inches in diameter and that they were 6 feet apart, the contract, as I understand it, calling for poles from 4 to 5 inches in diameter and 4 to 8 feet apart; and you may assume that they should be put in 6 feet apart.

The Witness: The volume of each pole or of all?

Q. (Continuing.) The volume of all the poles.

Mr. Erwin: In one mattress you mean?

Q. (Continuing.) In one mattress. And on the understanding that in using the word 'volume' we both mean the cubic inches or equivalent in a pole.

Mr. Erwin: You did not state to him the size of the mattress, and as that varies, you would have to.

Q. (Continuing.) You can assume that the mattresses were 50 by 100?

The Witness: How do you want the volume expressed, in cubic feet, cubic yards, or the length of poles in a cross-section?

Q. (Continuing.) Either in cubic inches or cubic feet.

A. There would be 3,300 feet length of poles each

having 12.6 square inches cross-section; but supposing they are 6 feet apart, and the mats are 50 feet, that makes 8 and a fraction, 8 1/3 that way, but when you come to take the other length 100 feet and the poles that way, at 6 feet, supposing there would be 16 2/3 so that I should expect in looking over a mat of that sort to figure it on the basis of eight of them for the 50 foot width and 17 for the 100 foot width, and that would give the approximate quantity, at least in the neighborhood; you could not object to the contractor putting it that way, if he wanted to.

Q. That is to say, with the poles which ran lengthwise of the mat there would be how many?

A. Eight poles the 50 feet way.

Q. 100 feet long?

A. 100 feet long, and then there would be across them 17 poles 50 feet long and that would make a proper grillage. Then there would be the bottom grillage just the same twice. And eight poles of 100 feet, that would make 800, 17 of 50 feet would be 850, and the sum of the two would be 1,650; that would be the top grillage, and the bottom grillage would be an equal amount; twice 1,650 would make 3,300 feet length of poles of 4 inches diameter; and the 4 inches diameter would be about 12.6 cross-section.

Q. You mean by that, that for every inch of the pole there would be 12.6 cubic inches?

A. Yes; that is, I do not carry cross-sections exactly in my head, I have figured them the same way they are ordinarily figured, I took some diameters out of the note book the other day and I will look and see. 12.57 is the exact area, I have called it 12.6.

Q. 12.57?

A. Yes, sir, the exact area of that diameter.

Mr. Erwin: 12.6 what?

The Witness: 12.6 square inches, are of a 4 inch diameter.

Q. (Mr. Stone.) You mean 12.6 cubic inches for each inch of length of pole?

A. Yes, there are 3,300 feet length of pole with an area of 12.6 square inches, that is a cross-section of 12.6 square inches of pole, which would make 3,438 cubic feet. Now, that is as it would ordinarily be figured. There is a very slight difference between the volume of the pole,

owing to the taper of the pole, but the specifications say that it shall have an average of 4 to 5 inches, which is called an average of 4 inches, and in a pole of that length, with 3 inches at the small end, it would for all purposes of brush work and mattress work be approximately figured as a cylindrical pole of 4 inches diameter.

Q. Now, if 8 such mattresses were built it would take, if they were built just like the single one, it would take eight times as much poles, wouldn't it?

A. Eight of them, yes.

Q. And it would not make any difference whether those were built each by itself, or one on top of the other, as to the amount of poles, if they were built according to these specifications?

A. According to these specifications, the mattresses would be just the same whether made separately or stuck on top of each other, so far as I can see.

Q. Now, Captain Carter testifies that early in 1893 he and Lieut. Rees made experiments and found that if they sunk these brush mattresses of the third design in multiple, that is to say, one on top of the other and sunk them all at one time, that it would take the same amount of stone to hold down or put in place a multiple mat, as it would to hold in place a single mat, and that, therefore, he instructed the contractors to put the mattresses in in multiple, that is to say, one on top of the other, and that eventually they put in very many of what is called 8-course mattresses, that is, eight single mattresses on top of each other, and that these were sunk with the same amount of stone that it would take to sink a single mattress, and that in the practical workings of the plan he found that if he placed one mattress on top of another, there would be four rows or layers of grillage poles between each mattress of 4-inch poles, which would make a crib work, or as I call it a lattice work, through which the water would rush and undermine or injure the structure, and that therefore he instructed the contractors to omit certain of those grillage poles, or binder poles, and to put in place thereof an equivalent amount of brush, and that that was done; and the evidence shows that in building the 8-course multiple mat and sinking it, under the big contract at Savannah, that 18 rows or layers of these grillage poles were omitted and only fourteen rows or layers of grillage poles put in, and he claims that in lieu of the

omitted grillage poles the contractors were required to put in an equivalent amount of brush. The witnesses for the complainant, especially Mr. Cooper, who is the only man who appears to have testified of his own knowledge, states that an 8-course mattress was never passed as an 8-course mattress unless it stood 12 feet in height after omitting these 18 rows or layers of grillage poles, and there appears to be no dispute that the 8-course mattresses put in under the big contract at Savannah averaged 1½ feet for each single mattress, or 12 feet for eight single mattresses built on top of each other and known as an 8-course mattress.

I will first ask you what maximum height could have been given to that 8-course mattress by the fourteen rows of 4-inch grillage poles which were used in the construction of that big mattress, without calculating at present any compression of the poles into the adjoining brush fascines? It would be 56 inches, would it not?

A. The eight courses of mats and 14—

Q. No, I merely ask you what the binder poles would be, independent of the fascines or anything else?

A. Oh, the fourteen binder poles would be, on the basis of 4 inches diameter, would be 56 inches.

Q. Now, these binder poles if placed in a structure like the 8-course multiple mat, 50 by 100 feet long, the lower tier of binder poles would have a great weight upon them, would they not?

A. They would be pretty heavily weighted down, all of them would be more or less weighted down except the top grillage. The top grillage would be weighted down very little and the bottom one would be very heavily weighted.

Q. Where these poles cross each other, as they would, with that weight on them, being 4-inch pine poles with that weight on them, being 4-inch pine poles with the bark not being removed, they would sink into each other more or less, would they not?

A. They would sink in a little under heavy weight.

Q. Well, would they sink in on an average on that mattress as much, say, as one-half inch?''

* * * * *

''A. Well, I have never experimented with poles, binder poles, to see how far they would crush into each other under the circumstances, under weights of that

nature, but a quarter of an inch to a half inch would not be at all surprising; if a quarter of an inch to three-quarters of an inch it would not be surprising, but a quarter of an inch would certainly be expected.

Q. It would be reasonable to expect an average of one-half an inch in such a case?

A. I do not consider it unreasonable; anything from a quarter of an inch to three-quarters would be not unreasonable." (Rec., 8461-72.)

"Q. That would make a difference in height of one-half inch at each place?

A. There would be five places where the poles would sink into each other, and you might consider they would average a half inch on each pole, making an inch where they touched each other. There would be five places where the poles would touch each other, and at each pole at each of these places you would lose one-half inch.

Q. That would make a total of how much?

A. The rest of the mashing would be where the poles touched the fascines, and the fascines would mash and not the poles, as a rule.

A. I am speaking of the places where the poles touched each other, there would be five losses of an inch each, making a total of 5 inches?

A. Yes.

Q. That would make the net height produced by these poles 51 inches in an 8-course mattress, would it not?

A The poles alone, yes.

Q. Now, the testimony shows that eighteen layers of grillage poles were omitted. Captain Carter testifies that these poles were omitted for the best interests of the work, as I have already stated, and that he required the contractor to put in an equivalent amount of brush, that is, an equivalent in the way of making the height of the mattress; now, how much height of mattress would the 18 rows of omitted grillage poles make, if instead of leaving them out altogether, Captain Carter had had the contractors lay them side by side and put them into the mattress how much heigth would they have produced? I am asking that for the purpose of seeing how much height those would produce, so as to see how much height of brush the contractors ought to have put in their place?

A. * * *

Q. How many feet of length of poles were omitted in omitting the 18 layers of 4-inch poles?

A. We figured there were 3,300 feet length of binder poles to a single mat, which had four layers of binder poles, that would make them for a layer, one-fourth of 3,300 or 825 feet.

Mr. Erwin: What do you mean, lineal feet?

The Witness: Lineal feet, 825 feet.

A. (Continuing.) 825 lineal feet for each layer of binder poles in a mattress; the mattress had two grillages, each grillage composed of two layers crossing each other; now, in those four layers, for one layer we had 8 binder poles, 100 feet long, and crossways on that there were 17 binder poles 50 feet long, that made 1,650 that was one grillage, the top grillage, and the bottom was just like it, that made 3,300 lineal feet of binder poles in one mattress. Now, you see that one mattress has four layers of binder poles which lay crosswise and one-fourth of 3,300 is 825, so one layer would be 825 feet long. Now one layer of binder poles would amount to 825 lineal feet of binder poles and 18 layers would be 18 times that which is 14,850 feet length of binder poles.

Q. That is to say, the length of 18 layers of binder poles omitted would be what?

A. 14,850.

Q. Now, take the surface of the mattress 50 by 100 and state how much length of poles 4 inches in diameter, if the poles were laid side by side, it would take to cover that mattress with 4-inch poles?

A. How many feet of poles?

Q. How many feet of poles, yes, to cover the mattress 4 inches high with poles over its entire surface?

A. If the mattress were 50 feet wide and 100 feet long, the poles laid down side by side, close together, there would be three to 1 foot, so there would be three times 50, equal 150, laid down across the 50 feet, assuming that there would be 150 poles, then each 100 feet long, which would make 15,000 lineal feet of poles, for one layer 4 inches high over the whole mattress.

Q. So then if the poles were reckoned as poles 4 inches high, 18 rows laid on top of the mattress would produce a height of exactly 4 inches, would they?

A Yes, sir, 15,000 lineal feet of pole.

Q. The way you figure it out, or by the exact figures that was 14,850?

A. 14,850, yes.

Q. Which is substantially the same amount?

A. Yes.

Q. We have already found that the 14 rows or layers of grillage poles that were put in would produce a height of 51 inches as far as we have gone, and we find that if the other 18 rows of poles had been placed on top of the mattress, instead of left out, that they would have made an additional height of 4 inches, would they not?

A. They would have made between 3 and 4 inches.

Q. If we call it 4 inches, that would make 55 inches as the height which all the grillage poles called for by the specifications would have produced, if 14 rows were put in in the manner we have mentioned, and the other 18 rows, instead of being left out, were put in side by side so as not to make any crib work, is that correct?

A. There is 55 inches height of poles that we have accounted for, and there is 72 inches height of plain fascines that we have not mentioned.

Q. I was not speaking about the height of the fascines; I was getting at this, we will take first how much height would be given the multiple mat by the 14 layers, and would have been given by the omitted grillage poles, if instead of being put in as cribbing they were placed side by side?

A. They would make not over 55 inches total height.

Q. That 55 inches height of poles, if the poles were put in that manner, would cover the entire height given to the 8-course multiple mat by all the grillage poles called for by the specifications, would it not?

A. Yes.

Q. Now, the witness Cooper, who was the assistant engineer, and who is a witness for the complainant, testifies that in all cases under the big contract the 8-course multiple mat was required to measure and did measure 12 feet high when it was ready to sink in the work. Now, if you deduct the 55 inches from the 12 feet, what is the difference?

* * * * *

A. 89 inches." (Rec., 8480-86.)

The Witness: "I think it might be well to add a note here in explanation of what I just figured out here about

the 3 inches and 4 inches, because the two computations are really a little different. The 18 layers of poles figure out approximately 4 inches total height on the basis that the poles are 4 inches square at the cross-section, but if you take the area of a 4-inch diameter pole, being 12.6 inches, and the convert that actual area into all the 18 layers in each cross-section, and then spread that over the surface, that is where I got the figure of 3.15 there.

Mr. Erwin: In other words, you were figuring on the basis of a pole which is a cylinder, cross-section, which was changed into a rectangular cross-section?

The Witness: Yes, that is it.

Mr. Erwin: Then if you laid the poles on top of the mattress, it was not changed to the cross-section?

The Witness: If you flatten some of them down a good deal, but it shows that it would be somewhere between 3.15 and a little less than 4 inches; so that 4 inches is a safe height for the purpose of comparison of what 18 layers would amount to.

Q. (Mr. Stone.) That is to say, in either view of that, 4 inches is as much height as would be given, whether you figure them the actual volume, or lay them side by side?

A. Yes, 4 inches is a little bit more than would be necessary." (Rec., 8483.)

"Q. * * * Now, assume, therefore, that all the 8-course multiple mats under the big contract measured 12 feet in height when they went into the work, the amount of brush that would be necessary to produce that height over and above the 51 inches of grillage poles, would be how much in height?

A. That being an 8-course mat, being 12 feet high, 144 inches?

Q. Yes.

A. We have 51 inches height of binder poles.

Q. Actually put in?

A. Actually put in.

Q. Deducting the height of the binder poles actually put in from the total height of mattresses and how much brush would there be in height?

A. There would have to be 93 inches height of brush to get the 144 inches, 12 feet high.

Q. If you deduct from the 95 inches of brush 4 inches in height of brush to make up for the omitted grillage

poles, you would have how many inches of brush that would have to be put in, in height to cover the fascines which the specifications call for?

A. 89 inches.

Q. That would be how much height for each fascine, there being 8 fascines?

A. That would be 11 inches.

Q. Now, producing that height of brush fascines, it would be necessary to put in brush, would it not? What I mean is, the structure could not stand on air?

A. No. I do not quite understand the question.

Q. I mean this, if there is a mattress 12 feet high, of which 51 inches in height is produced by the grillage poles put in and 4 inches in height is allowed for the omitted prillage poles which are left out, leaving 89 inches height produced by brush, it would be necessary to have 89 inches of brush to hold up that height, would it not?

A. It would have to be 89 inches—

Q. Assuming nothing else but brush was put in?

A. It would have to be brush to get the height.

Q. That would be 11⅛ inches for each of the 8-courses of brush fascines, would it not?

A. Yes.

Q. *If those fascines were loosely tied, as Mr. Erwin suggests, they would flatten out, wouldn't them?*

A. *They would flatten out very decidedly.*

Q. *If those fascines did not contain a sufficient amount of brush, they would not produce that height, would they?*

A. *Well, you would have to have* 11⅛ *inches after they were flattened, if there were just* 8 *of them.*

Q. Well, there were only eight, and they would have to have enough brush, would they not, so that after they were flattened out they would still stand up 11⅛ inches?

A. 11⅛ inches, yes, sir.

Q. Look carefully at the specifications and see what amount of brush fascines the contract calls for?

A. The specifications asked for fascines that will be choked to a diameter of 9 inches at an interval of 2 feet, tied with wire or tarred rope, made of brush.

Q. If you take 8 layers of that kind of fascine, choked to 9 inches, by hand power, is it not?

A. By hand power is the usual custom, there is nothing here to indicate anything different.

Q. There is nothing there to show that they were to be subjected to any other pressure or power that was to be put on them, is there?

A. They were to be pressed tightly, but there is nothing said about the pressure being anything different, except that they were to be choked.

Mr. Erwin: Compressed tightly?

The Witness: Compressed tightly at intervals of 2 feet, choked at intervals of 2 feet to a diameter of 9 inches.

Q. (Mr. Stone.) By what is called a hand choker, is it not?

A. I do not see that it says anything about a hand chaoker, but a hand choker is ordinarily used.

Mr. Erwin: Look and see if it don't state how they were to be choked.

The Witness: It says 'by an approved form of choker.'

Q. (Mr. Stone.) The testimony shows that it was a hand choker that everybody used for that kind of work. So you can assume that in your answer. Now, if you take a layer of those 9-inch fascines choked as the contract calls for there to a diameter of 9 inches at the choke, and put them into that big mattress 100 feet long by 50 feet wide, and 12 feet high, and allow them to flatten out as they would under pressure, would they give any such height as 11¼ inches for a layer?

A. *It would not be expected from one which is made according to the specifications here choked to 9 inches; they would flatten down a good deal more than 9 inches.*

Q. *Instead of giving a height of 11¼ inches, they would flatten down so as to give a height of less than 9 inches, would they not?*

A. *If made according to contract they would.*

Q. And put into that big mattress?

A. They would, under the load that is stated to be on them." (Rec., 8481-86.)

"Q. Assuming the total weight of a 50 by 100 by 12 foot mattress, ready to sink, was 200 tons, how much height would the 9-inch fascines called for by that contract average to give, as near as you can state?

A. I would not be at all surprised to see it flatten

down to 5 inches or 6 inches at the bottom of the pile, but I should be surprised if it did not flatten down to less than 7 inches at the bottom of the pile. I should expect to see it somewhere between 5 and 7 inches.

Q. Do you mean at the bottom, or on the average throughout?

A. At the bottom.

Q. What would be the average, say, if it would not flatten out as much at the top?

A. No, it would not flatten out as much as the top, but it would commence to flatten out at the top of the mattress or the next one, and keep on doing it all the way down. 6½ *inches I should say would be a reasonable average.*

Q. *Then if these 8-course multiple mattresses put in under the big contract were 12 feet in height and contained 14 rows of grillage poles, which you say would give a height of 51 inches, and contained 4 inches in height of brush to make up for the grillage poles that were omitted, and if the fascines put in, in order to make that height must necessarily have stood up 11¼ inches per layer, or per mattress, the amount of brush put in those 8-course mattresses per mattress would be much more than the contract called for, would it not, in order to produce that height?*

A. *Yes, I should suppose so, I should imagine so.*" (Rec., 8487-88.)

"Q. Referring to the contract at Cumberland Sound, let in 1896. It appears that in the Cumberland Sound work the same plan was adopted by Carter of omitting grillage poles and requiring the contractor to put in brush equivalent to the amount of grillage poles, in place of the grillage poles. The evidence shows that an 8-course mat at Cumberland Sound measured from 100 inches, which was an exceptionally small height, up to 9 feet and 9 inches, which was 117 inches. It also shows that more grillage poles were omitted there than were omitted in the big contract at Savannah. It is claimed that in constructing the 8-course multiple mats at Cumberland Sound that only 11 layers or rows of grillage poles were put in, namely, two rows on the bottom running crosswise of each other, two rows on top running crosswise of each other, and one layer of grillage poles put between the mattresses, the grillage poles being, according to the contract, from 4 to 8 feet from the adjoining grillage

poles. That is substantially the same plan that you have been talking about with regard to the big contract at Savannah, is it not, except that more grillage poles were omitted, there is only one layer of grillage poles and one of brush fascines?

A. Yes." (Rec., 8492-93.)

"Q. (Mr. Stone): Outside of any possible difference in the length of the fascines, the two contracts, one the big contract in Savannah, 1892, and the other the Cumberland Sound contract of 1896, you may assume are substantially the same; because Mr. Erwin and I both understand they are substantially the same, and if they are not he or I can point it out later on. Now, constructing that mattress, instead of omitting 18 layers of grillage poles, there were 21 layers omitted. You have already stated that the omission of the 18 layers of grillage poles would have been equivalent to between 3 and 4 inches, if the poles instead of being omitted had been laid side by side on top of the mattress, and the omission of 21 poles would make about one-sixth more, would it not, in height?

A. 21 omitted.

Q. Yes; 21 omitted instead of 18.

A. The difference would be within somewhere between three and six-tenths and four and six-tenths inches in height, for the omission of 21 layers of poles.

Q. That is to say, if the 21 layers of poles instead of being omitted had been piled on top of the mattress, they would have given a height to the matress not exceeding 5 inches?

A. Yes, sir; somewhere between three and six-tenths and four and six-tenths, according as to whether they considered that piling up as being 4 inches square or 4 inches around and lying into each other as they piled up, but 5 inches would be more than any computation.

Q. Captain Carter testifies that he required the contractors in place of those omitted grillage poles which would have given a height of 5 inches, to put in an equivalent of brush, namely, 5 inches of brush. Now, the mattresses as actually constructed at Cumberland Sound had two rows of grillage poles at the bottom and two rows of grillage poles at the top and then a single row of grillage poles between each fascine layer. Those rows of grillage poles between each fascine layer were from 4 to 8 feet apart. Would they have given any appreciable

height to the structure, those 7 layers of 4-inch poles, that were from 4 to 8 feet apart between the brush fascines?

A. If they were just simply stacked up, fascines and poles on top of them, why the poles would sink into the fascines so as to hardly be noticeable, but if they are under a great deal of heavy weight, then when the fascines are pressed down from a diameter of 9 inches, or choked to what they would flatten down to, then the poles themselves would have some appreciable effect in thickness, in addition to the six and one-half inches which the fascines would meaure.

Q. That is to say, if the fascines were flattened out to six and one-half inches, then the poles would give a height to the mattresses of nearly the extent of their diameter?

A. Very nearly their diameter, yes.

Q. That would be a total of how much height that a layer of fascines and layer of poles would give under those circumstances?

A. About 10 inches.

Q. And if there were 8 layers of poles and 8 layers of fascines, that would be 80 inches, would it not?

A. That would be 80 inches.

Q. Then there were three layers of poles besides that, two layers of poles would be on the bottom and two on top. Now, those on the bottom would squeeze down pretty close, would they not?

A. Those on the bottom would mash into the fascines.

Q. You have already figured, I think, that the height of the flattened fascine together with the height of the pole would be 10 inches, and 8 of them would be 80 inches; now, there were three other layers of poles put into the mattress, and even if you assume that they went in at full width, that would make 12 inches?

A. Yes.

Q. That would make a total height of 92 inches?

A. Yes.

Q. Then if you add 5 inches for brush, which was to make up for the omitted grillage poles, you would have 97 inches, as the height of the mattress required by the contract if built in that way, would you not?

A. Yes.

Q. *And hence if the lowest mattress in height was*

100 inches, and the fact is the testimony shows many of them were 117 inches, the contractors put into that work as much material as the contract called for, did they not?

A. *So I should consider.*" (Rec., 8495-97.)

The only witnesses for the Government, *who testify they actually saw those fascines constructed,* are four men.

Those four men, who testified as witnesses for the Government, are Royal Sawyer, Elisha Winter, Edward Burke, and Rufus Habersham.

Royal Sawyer testifies as follows:

"Q. What kind of work were you doing?

A. Tying brush bundles." (Rec., 1794.)

"Q. How did you make them?

A. We had a twister, a pole with ropes about that long (indicating) running through each end and to the center of the pole, and two men would turn the stock, and one cut the brush, and two tied." (Rec., 1794.)

The Witness: "We made that 15 feet long, and put 6 or 7 strings on the bundle.

Q. What kind of string did you use?

A. A little tarred string not quite as large as my finger." (Rec., 1795.)

"Q. How tightly could you tie them together in the way you have described?

A. We could make it as tight as we could hold it, sometimes, according to how large a bundle it would be. If we had soft brush it could not be tied so tight, sometimes; if it was hard poles, then it would be tighter." (Rec., 1796.)

"Q. You worked for Mr. Gaynor from 1883 to 1894?

A. Yes, sir." (Rec., 1797.)

"Q. You did the best work you could?

A. Yes, sir." (Rec., 1797.)

Elisha Winter testifies as follows:

"Q. Did you ever work making bundles of brush?

A. Yes, sir.

Q. What were they to be used for?

A. They called them fascines, to be put on mats; built the mats first then afterwards helped get the brush.

Q. How many did it take to make a bundle?

A. Three men to the bench.

Q. You were one of those?

A. Yes, sir, I was one.

Q. What part of the labor did you perform?
A. Used the cuttin' axe,—choppin' axe we called them.
Q. What did the other two men do?
A. Twisted and tied." (Rec., 1802.)
"Q. You did your work well?
A. Yes, sir.
Q. The best you knew how?
A. Yes, sir." (Rec., 1805.)

EDWARD BURKE testifies as follows:

"Q. What were you doing?
A. Foreman in the woods, making fascine bundles, making these same bundles of brush. (Rec., 1807.)
"Q. How many men did it take to make a bundle?
A. Three.
Q. What was their different work?
A. Two men to the bench, and one chopping." (Rec., 1807.)
The Witness: "*What I used to make would go* 12 *inches all the way through, and string was tied around it.*
Q. Were your instructions to make them 12 inches?
A. Yes, sir.
Q. Who instructed you to make them 12 inches?
A. The boss over me." (Rec., 1809.)
"Q. Whilst you were there you did honest work?
A. Yes, sir.
Q. Did the best you could?
A. Yes, sir.
Q. And they told you they wanted them 12 inches through?
A. Yes, sir.
Q. You choked them up as tight as you could?
A. Yes, sir.
Q. And when they didn't choke them up tight that way, what did you do?
A. Rejected them.
Q. But as far as you knew how you did the best you could under those instructions?
A. Yes, sir. (Rec., 1810.)
"Q. Did they have a choker there?
A. Yes, sir.
Q. How many men worked on that choker?
A. Two.

Q. One on each side?
A. Yes, sir.
Q. When they choked it down, who tied it up?
A. One held the stock after they choked it, and the other man done the tying." (Rec., 1811.)

The Witness: "You can choke one 15-foot bundle in about 5 to 7 minutes." (Rec., 1811.)

The Witness: "Here is the choker with a hole in the center, and that is about three feet long.
Q. Then 1½ feet on each side, that is what you mean?
A. Yes, sir.
Q. And how long was the rope attached to it?
A. What you twist it with?
Q. Yes.
A. Sometimes the rope would be 3½ and sometimes 4 feet long,—about four feet, or something like that." (Rec., 1808.)

RUFUS HABERSHAM testifies as follows:

"Q. Where were you at work in 1893 and 1894?
A. Working for Mr. Gaynor." (Rec., 1813.)
"Q. Were you engaged in the making of bundles of brush that year?
A. Well, I did in the latter part, engaged in making brush." (Rec., 1813.)
"Q. How long were the bundles you were required to make?
A. Fifteen feet.
Q. *How large through?*
A. *Twelve inches through.*" (Rec., 1813.)
"Q. When you got to building these bundles of brush, did you work honestly at the work?
A. Yes, sir; done all I could.
Q. They told you they wanted them 12 inches; did you choke them up tight?
A. Yes, sir.
Q. As tight as you could?
A. Yes, sir, as tight as I could.
Q. You did good, honest work, did you?
A. Yes, sir." (Rec., 1816.)

The men who inspected the mattresses testify they were all built in accordance with the requirements of the contract.

E. R. CONANT, a witness for the Government, who had been an inspector on the work at Cumberland Sound in 1894, testi-

fied, when asked whether the amount of brush required by the specifications had been placed in the work, as follows:

"A. Now, these specifications are interpreted in different ways by different engineers, as I have found out since I have been here, and each one has a different interpretation. As to the diameter of the fascines, *I think the average diameter in the specifications was carried out;* some ran more than 9 inches, and some, perhaps, would run less than 9 inches." (Rec., 773.)

Milnor P. Paret, assistant engineer, states in his official report as follows:

"The fascines were 15 to 18 feet long, and *about* 14 *inches in diameter.*" (An. Rep. C. E. 1890, p. 1418.)

Major Thomas H. Rees, Corps of Engineers, testifies in Carter's favor as follows:

"A. * * * I have inspected and been on all the work going on in the district." (Rec., 2840.)

"Q. Have you seen the so-called multiple mats made in the district?

A. I have seen them three courses thick.

Q. Did you ever see any that you could not walk over without walking the pole?

A. No; I never saw any but what it would be perfectly easy to walk over them.

Q. Did you ever see any but you would have sunk in up to your hips, for instance?

A. No; *I have walked over them with ease, and without danger of falling in.*

Q. *And you saw no great holes or spaces where the brush was loose, or no brush?*

A. *Never.*" (Rec., 2847.)

"Q. Did you inspect them (brush mattresses) as an inspector, or for the purposes of observation of your own?

A. I inspected them as an inspector, and in order to report to Captain Carter as to their condition.

Q. How many times did you make such inspections?

A. I was frequently directed to make inspections of that kind. I don't remember how many times I have inspected in that manner; the works here in Savannah Harbor on several occasions, the works at Brunswick, the works at Fernandina.

Q. At Brunswick; the mattress construction?

A. The mattress construction, and the whole process from the brush camp to the work, and the stone as well.

Q. How many times did you visit the brush camp?

A. Four or five times, I presume.

Q. Was that where they were making the fascines?

A. Yes, sir." (Rec., 2873.)

The Witness: "Frequent irregular visits were made.

Q. So that the inspector or assistant engineer might at any time, be subjected to a rigid examination on the work just measured?

A. He might, and frequently was." (Rec., 2845.)

The Witness: (After examining a fascine.) "That is a fair sample of the character of the fascines that I have seen constructed and going into the work; many that I have seen have been a little larger with respect to the quantity of brush in them, and the compactness with which they were bound; that is just as I remember to have seen them; they were frequently a little larger than that, but always of about that character.

Q. Did you ever see any chokers actually in the brush camp and actually used upon the fascines to go into the work?

A. I have. All the fascines I saw constructed were constructed by the use of chokers." (Rec., 2845-46.)

"Q. Do you remember ever hearing Captain Carter, during the time you were here, give any verbal instructions to his inspectors or assistant engineers, with respect to the manner in which this work should be carried out, and their duties in that behalf?

A. I have heard him give such instructions frequently.

Q. In substance, what were the instructions you heard him give?

A. They were, in general, that the assistant engineer or inspector, whoever it was, should carry out the specifications and should look after the interests of the United States. That was the general trend of the instructions. I don't remember the works that were used. * * *

Q. Was Mr. Cooper on the work at that time?

A. He was.

Q. Do you remember specifically whether any such instructions were given him?

A. I know that he did receive such instructions; I don't remember any special instance where it was, or just what the work in hand was, but I can remember

that he did receive such instructions from Captain Carter." (Rec., 2842-43.)

"Q. During the four years you were here, were the duties of Captain Carter on the outside numerous; I mean on his works outside of his office?

A. He was nearly all the time upon the work; not nearly all the time, but he was out on the work the greater portion of the time; he was more out on the work than in the office." (Rec., 2844-45.)

With regard to certain unused fascines, which Gillette found in the woods and claimed was probably the same as those which went into the work, MAJOR REES testifies:

"Q. From your experience with brush work in this district what would you say the effect would be upon, say, this new fascine to lie out in the sun in the vicinity for 2 or 3 months?

A. The leaves would all fall off, and many of the smaller twigs would fall off, and the wood would shrink, the tar in the binders or ties would evaporate, and they would become white; they would rot and become weak, and they would also become loose, due to the loss of material, the leaves and twigs falling out, and due also to shrinkage of the wood." (Rec., 2847-48.)

With respect to the method of fascine construction, MAJOR REES testifies:

"A. At different times I have seen them made in different ways. One was where they were made right in the woods where the brush was cut; ways would be made up with stakes crossing one another and driven into the ground to make a bench or rack in which to pile the brush; the brush having been cut, and brought to this rack, was piled into it until a sufficient quantity was used to make the required dimensions of the fascines. Then the chokers, consisting of two stakes connected with a rope, this mass of brush was compacted and packed down tightly, and a wrapping of tarred rope placed around it to hold it in the compressed state." (Rec., 12305.)

The Witness: "I made the inspections under orders given by Captain Carter to make the inspections to see that the work was being properly done, and that is what I did." (Rec., 12329.)

"Q. And what did you find in making these inspections, with reference to the work, as to whether the work was being done properly or not?

A. *I found that the work was being done in accordance with the specifications, as I understand them.*" (Rec., 12329.)

"Q. If it were in evidence, adduced by the prosecution, that the mattresses in Cumberland Sound—the multiple mattresses in Cumberland Sound,—after their load of rock had been put on them,—a light load of Florida rock had been on them, and after they had been in the work for some month, had stood up one to a height equal to one foot per course (Rec., 1625-26)—what would you say as to the character of the fascines which must necessarily have gone into such mattresses?

A. I should say that there was at least as much brush as was required by the specifications, and probably more, to have stood up to that height under the load of stone; that *there was fully as much brush as could be required under the specifications.*" (Rec., 2916.)

"Q. Could mattresses made of such fascines as are here exhibited in the court-room—the old fascines—have stood up one foot per course under the given load as stated,—these old fascines in their present shape?

A. No, I don't think they could possibly." (Rec., 2917.)

R. F. Ensey, the assistant engineer who had charge of the mattress work under Captain Carter, when multiple mats were first built in 1893, testifies in Carter's favor as follows:

"Q. Did you see mattresses built?

A. I did. Afterwards, at the first of the year 1893, I was placed in charge of all that work." (Rec., 3355.)

The Witness: "My inspection of the fascines was such as would convince me that the fascines averaged at least to the specifications and over.

Q. In all respects?

A. In all respects." (Rec., 3355.)

The Witness: "*All works, sir, that were under my inspection were carried out according to the specifications.*" (Rec., 3359.)

The Witness: "I saw a spirit manifested by the contractor to carry out the specifications.

Q. A conscientiousness that was quite apparent?

A. Unquestionably." (Rec., 3361.)

The Witness: "I made it by business to see that the fascines were up to specifications, and in the construction

of the mat, I would not allow the use of any fascines that I considered below the specifications.

Q. *As a matter of fact, did not the fascines run larger than the specifications required?*

A. *They averaged considerable larger.*" (Rec., 521.)

The Witness: "I measured some that measured as much as 16 inches." (Rec., 529.)

The Witness: "The fascines were brought down on barges, and I made the mattresses.

Q. The fascines were made and delivered and the contractor made the mattresses under your supervision?

A. Yes, sir." (Rec., 527.)

The Witness: "I sank every mat with one exception. * * * I was instructed to keep my eye on the mats myself, and see to the building of them, and the sinking, which I did, as I say, with this one exception.

Q. Were any mattresses ever paid for that were not favorably reported on by the inspectors as being sunk according to the specifications, properly?

A. Not that I know of." (Rec., 526-27.)

"Q. Suppose a mattress fell below the specifications in the method of construction?

A. I would not have sunk it." (Rec., 526.)

W. G. Austin, a soldier, who received a medal of honor from Congress for distinguished gallantry under fire at the battle of Wounded Knee (Rec., 3240), and who was afterwards a Captain of Volunteers during the Spanish war, and who was an inspector on the Savannah work when multiple mattresses were used, testifies in Carter's favor as follows:

"A. I was assigned to duty as inspector on the Savannah Harbor works, contract of 1892." (Rec., 3240.)

"Q. And you have done no inspection of fascine or mattress work since that year?

A. Since June or July, 1893.

Q. In that time, how many yards of mattress did you measure?

A. I measured probably from 200 to 225,000 square yards." (Rec., 3242.)

"Q. How many men did it take to handle the fascines down here, from the barge to the training wall?

A. I have seen 4 men detailed for that purpose; three could handle it but I don't think three men could last all day handling those heavy fascines.

Q. How long were they?

A. Fifteen feet; that is, if they had to unload as they did down there, several barge loads a day, three to five barge loads, thrown them over the wall, it would take three to four men to handle it." (Rec., 3258.)

"Q. How closely were the fascines compacted into the mattresses?

A. *They were put in as closely as about four men could shove them in with their feet and hands;* * * * *the men forced them down with their feet or hands, braced themselves and forced them down; in some cases, where a lever could be used, that was used to force them in.*" (Rec., 3259.)

The Witness: "*The specifications called for a fascine of 9 inches in diameter, and quite frequently the fascines ran from a foot to a foot and a half.* * * *

Q. Was that to the advantage or disadvantage of the contractor?

A. That is plain; it certainly was to the advantage of the Government." (Rec., 3260.)

AUSTIN testifies concerning the old abandoned fascines, taken from the woods in 1897 by Captain Gillette, for the purpose of attempting to show that bad work had been done:

"Q. Did you ever see any such bundles go into any work in this district?

A. Never saw such a bundle as that on the work, unless it was probably half a dozen about such as that that crept into the barge load of several hundred, and they were thrown out by the contractor himself. I discarded one or two of them but the average of the brush that went in was probably from 2 to 500 per cent. better than any bundle that was exhibited in the court room." (Rec., 3245.)

The Witness: "After they reached the court room they were not the same bundle of brush as they were when I first saw them; a good deal of the brush had been worn off, or rubbed off, broken off, dropped of." (Rec., 3245.)

THOMAS F. DANIELS, an inspector who had been employed on the Savannah Harbor works since 1893 (Rec., 538), testifies in Carter's favor:

"Q. Were the fascines always properly choked?

A. As far as I know, they were. * * *

Q. The specifications require the fascines to be at least 9 inches choked, to be at least 9 inches in diameter?

A. Yes, sir; the bundle.

Q. Did the contractor, as a rule, or ever on an average, put in any more than that amount of material?

A. I think he did.

Q. Did he put in any more?

A. So far as I know, these bundles measured more than those do now." (Rec., 541.)

"Q. How did you understand that the fascines used in the work compared with the specifications?

A. They were up to the specifications at that time." (Rec., 539.)

"Q. When there was any difficulty concerning the mattress courses not being properly, or being lost in sinking what were your instructions?

A. To make a deduction.

Q. Didn't you do that?

A. I did." (Rec., 543.)

CAMPBELL FORD, a civil engineer, who was inspector on the Savannah work in 1894, testifies in Carter's favor:

"A. They were the multiple mats, built up mostly of four steps, and the total height I think was about 12 feet." (Rec., 3144.)

"Q. How were those mattresses constructed? I mean were they compactly made or not?

A. Yes, they were compactly made.

Q. Did you notice the fascines in them, whether they were well choked?

A. As far as one could judge they were fairly choked.

Q. Did you ever go into the mattress camp?

A. I did.

Q. Where?

A. I don't remember the name of the camp, but up the river here some miles above. I went up there to superintend the construction of the final mat that was made for the end of the training wall." (Rec., 3144-45.)

"Q. How were the fascines that went into that mattress made—were they well made or not?

A. *They were good fascines.*

Q. *Plenty of brush in them?*

A. *Good.*

Q. *How were they choked?*

A. *They were well choked.*" (Rec., 3145.)

"Q. And as to the mattresses made before this final

mattress, the ones which you saw go into place, how did they compare with the mattress you have just described?

A. I think they compared very favorably. I have no difficulty—I had very little instruction to give up there in the making of that mat. The colored man who had charge of making the mat there seemed to know his business well and I had very little occasion to make any complaint at all." (Rec., 3146.)

"Q. Now, if those mattresses had been constructed loosely, poorly assembled, and poorly made fascines, would they have stood this pulling and butting?

A. It is very doubtful; I think they had to be pretty stout to stand the rough work they had to undergo there.

Q. Did you in any of the mattresses which you saw go into the Cockspur Island training wall, did you see any holes in them, I mean large holes?

A. No, not that I remember; we were always able to walk over the tops of them and take the measurements." (Rec., 3146-47.)

THOMAS F. GAYNOR, a foreman in charge of fascine and mattress construction, testifies:

"Q. You saw practically all the mats built, didn't you?

A. Practically all of them.

Q. Were there any holes left in them?

A. No, sir." (Rec., 12989.)

"Q. *How large in diameter were those fascines?*

A. *From* 12 *to* 13 *inches.*" (Rec., 12990.)

"Q. How many men would use the choker?

A. Two men to use the levers, one to each lever." (Rec., 12990.)

"Q. How were those fascines put in with reference to being shoved up closely one to the other?

A. They were shoved up tightly, close together." (Rec., 12985.)

"Q. And did you use anything to get them down tight?

A. We would use a twist; that is, a stick, and twist them up in that way.

Q. And that would be gotten down tight in that way?

A. Yes, sir." (Rec., 12989.)

W. M. CONNELL, a foreman in charge of fascine and mattress construction, testifies:

"Q. *And were they made a foot in diameter?*

A. *Yes.*

Q. *Tightly compressed and choked?*

A. *Yes.*" (Rec., 13023.)

"Q. Were the fascines put in them (mats) tightly compacted one up against the other?

A. Very tightly, yes, sir." (Rec., 13022.)

J. H. GAYNOR, a foreman in charge of sinking the mattresses, testifies:

"Q. From the 1893 storm down to the finishing of the 1892 contract, did you see every mat that was sunken in the work?

A. That is the multiple mats?

Q. Yes.

A. Yes, sir.

Q. Did you go on to them before they were sunken?

A. About every one.

Q. Was Cooper there with you at the time the mats were brought down?

A. Most of the time." (Rec., 13092.)

"Q. Did these mats have any holes in them?

A. Not that I could see.

Q. You could see them if there were any there?

A. Yes." (Rec., 13092.)

"Q. * * * Did you ever see Cooper crawl down through a mat?

A. I never did.

Q. Nor anybody else?

A. No, sir.

Q. Through a hole in the mat, I mean?

A. No.

Q. Will you tell us how the mats that you saw constructed were constructed?

A. They first started with a row of poles running crosswise of the gin; that is, the poles that formed the gin. Then, after putting on that, they would put another layer of poles across them.

Q. Then what?

A. They were wired together.

Q. Where?

A. At the crossings, and laps where the poles came together; where they came on a crossing, and sometimes

the pole would lap, and they would wire the lap; that is, outside of the crossing, they would sometimes take two laps together and wire that.

Q. Then what?

A. Then they commenced putting the brush on." (Rec., 13093.)

The Witness: "On top, the fascines, and then another row of poles running the short way of the gin." (Rec., 13094.)

"Q. And so on, layer after layer, until you got to the top?

A. Yes.

Q. And the top was a grillage like the bottom?

A. Like the bottom, yes, sir.

Q. And all wired through as testified to here, which you have heard?

A. I have heard it, yes, sir.

Q. Were these fascines made tightly choked?

A. Yes, sir.

Q. *What was the diameter of the fascines?*

A. *Oh, I should judge* 12 *to* 14 *and so on. Their aim was to get* 12 *inch.*" (Rec., 13094.)

"Q. Was that the construction of the fascines and the mats after the big storm of 1893, always as you have described?

A. Yes, sir, always." (Rec., 13094.)

CLARENCE C. COLE, a foreman in charge of fascine and mattress construction, testifies as follows:

"Q. From 1892 until the 20th of July, 1897, you were in the employ of the Atlantic Contracting Company?

A. Yes, sir.

Q. Always as foreman in the mat camps?

A. Yes, sir.

Q. During that time you saw many, many fascines constructed, did you not?

A. I did.

Q. Will you tell us how they were constructed?

A. Well, a bench was built from 16 to 18 feet long, with cross-pieces in that way, three of them, and the brush was laid between the cross-pieces, in between you know, and filled up, and then the brush was choked as tight as two men could choke it, and tied by a third man." (Rec., 13080.)

"Q. *How large in diameter were the fascines built?*

A. *Well, they were built* 12 *inches, sometimes a little more.*" (Rec., 13081.)

"Q. Were the fascines made in the manner you have described during all the time of your employment by the Atlantic Contracting Company?

A. Yes, all the time.

Q. Have you ever seen a mat in process of construction?

A. I have sir.

Q. More than once?

A. Many a time, yes.

Q. Will you tell us whether there were any holes left in it as it was being constructed?

A. Oh, no, sir; that would cost more than to make solid; they couldn't do that.

Q. Have you seen a completed mat ready to be sent off to the works?

A. Yes, many a time.

Q. Have you walked over the top of them when completed?

A. Certainly, yes.

Q. And have you walked over the different courses while in the process of construction?

A. Yes, sir. * * *

Q. Where was it that you have seen these mats in the process of construction?

A. At the different camps, nearly all the camps.

Q. You mean at the wharves where they were being built?

A. Yes, sir, where they were being built." (Rec., 13081-02.)

CHARLES SWEENEY, a Master of Steam Vessels on the Savannah River since 1874, testifies that he had been employed by the Atlantic Contracting Company, etc.:

"A. Ever since 1882 up to a couple of months ago, off and on, when there was any contract going on in the Savannah River." (Rec., 13056.)

"Q. How many mats have you towed, Captain Sweeney, with your tug boat altogether?

A. We might have towed 2,000 or 3,000; the dams built were, some of them, two miles long." (Rec., 13056.)

"Q. Did you ever see the fascines that they put into mats, see them build a mat?

A. I have seen them at the camp; yes, sometimes I would be there waiting for a tow." (N. Y. 2648.)

"Q. Have you seen them put the fascines in the mats?

A. Oh, I have, yes, sir.

Q. And see them wire, or sew as it is called, the mats together?

A. Yes, sir.

Q. Have you ever been on a mat?

A. Oh, yes, lots of times.

Q. Didn't fall through them and go out of sight, did you?

A. No, sir; I never went through one yet, and I have been on them, night and day, making them fast after towing them.

Q. Have you ever found any holes where you could fall down through them?

A. No, sir, I never did." (Rec., 13056-57.)

"Q. You have seen these fascines; were they tightly tied or not?

A. Appeared so to me, yes, sir." (Rec., 13057.)

"Q. Now, did you ever use your tug assisting in knocking the mat, or giving it a blow in order to get it off the barge?

A. Lots of times, yes, sir. * * * When we would knock the props from under the gin, the mats wouldn't slide off (sometimes the knots or something would hold the mats on them); and then we would hook one of the tug boats on to the end of the gin barge to pull it off with one of the other boats, and we would go off maybe one hundred feet with the 'Turner,' * * * that was the boat we had mostly around the jetty work, a handy boat she was, and the other would pull the gin barge off from the stone barge, and we would run off the Turner about 100 feet, and hit in on the end, and the mat would come off; the gin barge would slip from under the mats, and the mats go down into the water.

Q. Did you ever have to hit them more than once?

A. Yes, sir, several times, perhaps four times before we got it off.

Q. Hit a hard enough blow to break the bow of the boat?

A. Yes, sir.

Q. And yet wouldn't hurt the mat?

A. Not practically, no." (Rec., 13058-59.)

The Witness: "I have heard Cooper say, when Captain Carter came down and asked him how things were going, Cooper would tell him everything was going on all right; work was going on fine. * * *

Q. Did you ever hear him say anything about if the mats were good enough for the contractors, what relation that would have to the Government, or anything in that respect?

A. Yes, sir, I have heard him make those remarks, 'what was good enough for the contractors was good enough for the Government.' * * *

Q. That is, if they were strong enough to be handled and stand the wear and tear required to go in place, they were certainly as good as required?

A. Yes, sir." (Recc., 13064.)

George Y. Wisner, a civil engineer of great experience, testifies in Carter's favor:

"A. * * * With a given number of these mattresses superimposed, one on top of the other, that whether they were tightly compressed or not originally, the lower ones under that load must be to a certain extent pretty well compressed; and if these stood up a height such as is mentioned here, averaging them, taking them all through together, I should say, about 18 inches as they run, that taking out the thickness of your binding poles, the amount of the brush which must have been put in there must have been fully up to or more than a single row of 9-inch fascines. In other words, it conveys to my mind what seemed almost the fact, that *the brush must have been in excess of that in mattresses containing fascines only 9 inches in diameter.*

Q. That result would be to the benefit or disadvantage of the Government?

A. To the advantage of the Government." (Rec., 12109.)

"Q. Is it possible that such a mat could contain only one-third of the brush called for by the specifications?

A. No, sir.

Q. What would become of it if it contained only one-third?

A. It would be much thinner than the depth you mentioned.

Q. Than the foot to 18 inches?

A. Yes, sir." (Rec., 12122.)

"Q. Now, does the fact that the table of heights shows that the mattress when ready to put in place averaged from a foot to a foot and a half to the course, and your examination of the completed work and comparison of the height of the jetty with the original height as given by the engineers when it was put in, show anything with reference to the substitution of material in place of the omitted grillages?

A. *There must have been considerably more brush than required in a 9 inch fascine.*" (Rec., 12163-64.)

Mr. WISNER, accompanied by A. E. KASTL and H. C. RIPLEY, members American Society of Civil Engineers, made an examination of the work in question in December, 1897, and testified concerning it:

"Q. How did the survey made by you, showing the height of the jetty from the original bottom, compare with the reports or memoranda furnished from the engineer's office, showing the height of the jetty when it was originally put in?

A. It was very little changed, very little difference between the two, practically the same.

Q. What, if anything, did that show you with reference to the character of the work?

A. *They had practically remained as put in, up to that time.*" (Rec., 12103.)

"Q. Did this examination made by you and the comparison made by you with the reports furnished to you show you anything with reference to the amount of material used, according to specifications? * * *

A. *It showed that the amount must have been fully as large as required under the specifications.*

Q. *And in your opinion, was the work well or ill done?*

A. *Well done.*" (Rec., 12105.)

L. Y. SCHERMERHORN, a civil engineer of large experience, when asked whether the mat heights which Cooper swore he required the contractors to furnish, insured the amount of

brush required under the specifications, testified in Carter's favor:

"A. *I should say that the Government got all and more than that paid for.*" (Rec., 12438.)

The Witness: "*Got at least all the brush that it paid for.*" (Rec., 12439.)

C. P. E. BURGWYN, a member of the American Society of Civil Engineers, and formerly the engineer in local charge of the improvement of the James River, which is very similar to the Savannah, and who used much brush work, testifies in Carter's favor:

"Q. Do you mean that there must have been the quantity of brush required by the 9 inch fascines at least?

A. *Yes; in fact it is possible that there might have been more.*" (Rec., 12942.)

The Witness: "When they were originally put in there, they must have been very tightly packed, for this reason; that my experience in the construction of this mattress work has proved that beginning from 4 months, and continuing on right straight through for quite a number of years, a compression does take place in these brush fascines, no matter how tight it is compacted, and if that thing has stood up for that length of time you give me here, which in one instance is nearly a year, it could not have been anything except *very* tightly packed when it was put there." (Rec., 12943-44.)

That the fascines, if loosely tied and containing an insufficient amount of brush, would not give the height which was given by the fascines actually used in the mattresses is shown also by the testimony of LYMAN E. COOLEY, a prominent civil engineer of Chicago, who says:

"Q. (Mr. Stone.) The looser the fascines are tied the more they will flatten out, is that not true, if pressure is put on?

A. Change the configuration of the bundle you mean?

Q. Yes?

A. I think that is probably true.

Mr. Stone: And hence the less height you would get if you were measuring height?

The Witness: Yes, that would be true.

Mr. Stone: And the tighter they were tied the less they would flatten out or change their shape?

The Witness: I think that is true. There is this

fault in there: The lashings of the bundle would have to be very strong in order to preserve its form, to keep it from flattening, because the flattened length of the curve is a little longer than for a circle.

Mr. Stone: As a matter of fact, when a round bundle begins to flatten out, the amount of compression inside of the tie constantly increases, does it not?

The Witness: Yes, sir, it results in compression in itself.

Mr. Stone: And a loosely tied fascine, if laid down without any weight on it, would have a tendency to flatten somewhat, would it not?

The Witness: Yes, sir.

Mr. Stone: And if you put other fascines on top of it, it would flatten still more?

The Witness: That would be true." (Rec., 8583-85.)

For further details, see (Rec., 8058-85; 8333-50.)

With regard to the claim by complainant's solicitor that the fascines (brush logs) ought to have been inspected in the brush camps, to see if enough brush was put into each fascine, *the testimony of Col. Bixby, that* 11½ *inches of brush was put into each* 8*-course multiple mattress, where only* 6½ *inches was required by the contract* (Rec., 8485-88), together with the great mass of other evidence that more brush was actually put in than was required by the contract, is a complete answer; because the only object of inspection was to see that the contractors furnished as much brush as their contract required.

If the fascines and mattresses had been measured at the brush camps, the Government would have received only 9-inch fascines, when under no pressure. (Ex. 78; §38.) When measured at the site of the work, the Government received much larger fascines, due to the fact that those fascines were required to measure more than 9 inches, after being compressed by the great pressure in a 200-ton mattress, and after they had been still further compressed by the heavy wave action on the towing barges, etc. (Rec., 8069-81.)

Further than the foregoing, the measurement of the mattresses at the site of the work gave an automatic inspection of each fascine, since those fascines must have contained much more material than the contract required, in order to give the heights shown by their measurements. (Rec., 8131-32; 8356-57.)

LYMAN E. COOLEY, a prominent civil engineer of Chicago, testifies that the site of the work, and not the brush camps, was where the mattresses ought to be measured, saying:

> "The general proposition is that *you measure your product at the last point of the industry;* measure the finished product that you are using, if possible." (Rec., 8546.)

MAJOR C. McD. TOWNSEND, Corps of Engineers, testifies the site of the work was the proper place for the inspectors, saying:

> "A. Work being done by contract, *there would be no particular necessity for an inspector at the brush camp.*" (Rec., 2991.)

But in addition to the foregoing, there is plenty of evidence showing that Carter used every effort to see that everything was done honestly and in full accordance with the contracts.

In order to make sure that all work was done in accordance with the specifications to the contracts, Captain Carter issued to all his employes a book of Regulations, containing General Instructions for Inspectors, which was printed by authority of the War Department. An employe was first given the General Instructions, then he was given a copy of the Specifications, and then he was assigned to duty, usually at first under the immediate supervision of an older employe. His duties were defined in his General Instructions, partly as follows (C. M. Def. Ex. 7) (Rec., 1875).

Par. 93.

> "The general duties of an inspector are to inspect and measure material, and report whether the material and work are in accordance with the contract or not."

Par. 96.

> "He must thoroughly comprehend the specifications and his General Instructions."

Par. 97.

> "He will keep the contractor or his authorized agent fully posted concerning the work, and will call his attention to any actual or probable violation of contract, but will carefully remember that he has no control over the ways or methods of the contractor or his employees."

Par. 102.

> "* * * Mattresses will first be carefully examined and the inspector must satisfy himself that they are

constructed in accordance with contract before he accepts them for measurement." * * *

Par. 105.

"In case of minor defects in mattresses * * * the inspector will make a fair estimate, and report the amount in each case which is not up to the requirements of the contract, and submit his recommendations as to deductions or allowances to be made."

Each employe, in local charge of contract work, subscribed to the following certificate on each of his reports: "I certify on honor that the above report is correct" (Rec., 458), thus guaranteeing to Captain Carter that no work had ever been accepted or certified to him, by any of his inspectors, unless such work was in exact accordance with the requirements of the contracts.

Among the employes of Captain Carter, who certified "on honor" to him that all work had been done in accordance with the contract, was a man named A. S. Cooper, whose duty it was to inspect and measure the material received under the contract of 1892 at Savannah. Cooper was the assistant in local charge of that work from about August 1, 1893, to its close; and he swore concerning the mattresses:

"I saw nearly all of them go in." (Rec., 1173.)

"I inspected probably about nine-tenths of the material that went into that work." (Rec., 10916.)

This same Cooper is now a witness for the complainant, and is the person whom Gillette testified he had employed as a "detective" to work against Captain Carter. (Rec., 4183.)

Cooper admitted on the witness stand that he received specific orders from Captain Carter as follows:

"Mattresses will be first carefully examined, and the inspector must satisfy himself that they are constructed in accordance with contract, before he accepts them for measurement." (Rec., 1875; Def. Ex. 7; § 102.)

"Q. You remember that provision, do you?

A. Yes, sir." (Rec., 1201.)

Cooper also testified:

"Q. Did you have the specifications and the contract for this work?

A. Yes, sir." (Rec., 452.)

"Q. Do you think that I would have brought you down here and put you on this work if I had not had confidence that you would do what was right?

A. I don't think that you would.

Q. As a matter of fact, did I not rely absolutely on you when you told me anything?

A. I think you did.

Q. I relied upon you to tell me whether things were done properly or improperly?

A. I suppose you did." (Rec., 462.)

"Q. When you came here, you were brought here, not because of the knowledge of the work, but because I thought you were honest?

A. I think you did.

Q. Because I thought you would report the truth about matters?

A. Yes, sir.

Q. Have I not again and again told you that if a contractor attempted to do anything improper to let me know; have you not understood that you were put there to see to the interests of the Government?

A. Yes, sir." (Rec., 464.)

"Q. Have you not been instructed that under no circumstances should you be under any obligations or give favors to the contractors?

A. I think when I first came here I was given instructions of that character.

Q. Have those instructions ever been modified?

A. I don't think they have." (Rec., 464-65.)

"Q. Have you ever known of an inspector on the work who would have dared to let me know if he did accept any favors?

A. I don't think he would care to have you know it.

Q. Why?

A. Because they knew that they would be reprimanded for it." (Rec., 466.)

"Q. *Did you certify to the proper execution of the work in your report which you sent in as local engineer to Captain Carter?*

A. *Yes, sir.*

Q. *And upon your reports payments were made?*

A. *Yes, sir.*" (Rec., 458.)

After Cooper had been employed by Gillette, as a detective, he swore:

"A. I don't think I was ever told to carry out the specifications.

Q. I would like you to be positive about that.

A. I am positive." (Rec., 1200.)

That Cooper committed deliberate perjury is shown by the following:

MAJOR THOMAS H. REES, Corps of Engineers, testifies:

"Q. Do you remember ever hearing Captain Carter, during the time you were here, give any verbal instructions to his inspectors or assistant engineers with respect to the manner in which the work should be carried out, and their duties in that behalf?

A. I have heard him give such instructions frequently." (Rec., 2842.)

The Witness: "They were, in general, that the assistant engineer or inspector, whoever it was, should carry out the specifications and should look after the interests of the United States." (Rec., 2842.)

"Q. Was Mr. Cooper on the work at that time?

A. He was.

Q. Do you remember specifically whether any such instructions were given him?

A. *I know that he did receive such instructions.*" (Rec., 2842.)

CAPTAIN THOMAS H. LAIRD, Master of the United States Inspection yacht "Angler," testifies:

"Q. Did you hear him (Captain Carter) tell Cooper to live up to the specifications?

A. Oh, yes; to be sure that the United States was properly dealt with, and that they got the value of every dollar paid out.

Q. Did you hear him say anything about the carrying out of the specifications?

A. Always; that was the understanding, that he should carry out the specifications, that was the first thing he told him; 'to live up to the specifications' was his language." (Rec., 3466.)

GEORGE W. BROWN, an assistant engineer on the Savannah work, testifies:

"I remember that Mr. Cooper stated that the work was being well done, and was progressing satisfactorily. * * * He said the contractors had a good contract and were making money, *still, they were being held strictly up to the specifications;* that he was inclined to compliment himself

at the same time, from the fact that the contractors were using a device which he claimed to have invented, and said that by that they were able to save a great deal of money—that is, they were able to make a great deal of money; I think the device of building the fascines on lighters.

Q. Did he claim credit for that?

A. Yes, he claimed credit for that.

Q. Have you heard anything at all from Mr. Cooper wherein he thought the work was departing from the specifications in any way?

A. No, sir." (Rec., 854.)

R. S. Burnett, an assistant engineer in the Savannah District, testifies that:

"In 1895, he went with Mr. Cooper, the United States inspector on the harbor work, to see a large multiple mat sunk on the line of the Cockspur Island training wall; remarking that the mat was put together strongly, Mr. Cooper said that the contractor was obliged to build the mats strong and compact in order to get them in the work, the water being rough." (Rec., 985-86.)

Thomas F. Daniels, an inspector on the Savannah work, testifies:

"Q. Did you ever hear him (Captain Carter) give Mr. Cooper any instructions?

A. I did." (Rec., 3339.)

The Witness: "The instructions were, to Mr. Cooper, to see that the specifications were carried out to the letter; that is the substance. I don't say that is the exact words, but he said those words; and if they didn't carry them out, to stop the work." (Rec., 3339.)

Captain Charles Sweeney, Master of the steamer which sunk the mattresses, testifies:

"A. I was on the 'Turner.' I have heard Captain Carter come down there and ask Mr. Cooper how the work was getting along. He would say it was getting along finely, or some remark like that. I always have heard Captain Carter tell Mr. Cooper to keep the contractors up to the specifications." (Rec., 3475.)

Richard Jones, Steward on the U. S. Inspection yacht "Angler," testifies:

"Q. Do you know A. S. Cooper?

A. Yes, sir.

Q. Did you ever hear Captain Carter give Cooper any instructions?

A. Yes, sir; time and again.

Q. Where did you hear him give them to him?

A. On deck, aboard the 'Angler.'

Q. What were the instructions which you heard Captain Carter give to A. S. Cooper?

A. That he must do the work according to specifications, and I think Captain had some charts and things in his hand, and it was near the pilot house that he was showing Mr. Cooper what he was to do.

Q. Did you ever hear him give any orders to any other inspectors?

A. Yes, sir.

Q. The same kind of orders?

A. Yes, sir; to every one of them." (Rec., 3544-45.)

P. J. KEATING, a witness for the complainant, testified that he was an inspector; that he "had read the specifications" (Rec., 1357); and that he was told to see "that the work was properly done." (Rec., 1363.)

Keating testifies further:

"Q. Were you permitted to show any favors to the contractors, Mr. Keating?

A. No, sir.

Q. Nor did you?

A. Nor did I." (Rec., 1366.)

P. E. TWIGGS, another inspector, and a witness for the complainant, testifies that Captain Carter gave him:

"Instructions that the interests of the United States Government must be looked after, and the specifications carried out." (Rec., 1353.)

R. F. ENSEY, the inspector under whom the use of multiple mattresses was begun, testifies:

"A. All works, sir, that were under by inspection, were carried out according to the specifications." (Rec., 3359.)

E. R. CONANT, a witness for the complainant, who stated that it was upon his reports payment was made for the Cumberland Sound work of 1892 (Rec., 1614), testifies concerning the fascines used:

"A. * * * The average diameter in the specifications was carried out." (Rec., 1620.)

MAJOR T. H. REES, Corps of Engineers, testifies:

"A. * * * I have inspected and been on all the work going on in the district." (Rec., 2840.)

The Witness: "I made the inspections under orders given by Captain Carter 'to make the inspections to see that the work was being properly done,' and that is what I did." (Rec., 12329.)

The Witness: *"I found that the work was being done in accordance with the specifications, as I understood them."* (Rec., 12329.)

MAJOR REES testifies concerning the instructions given by Captain Carter:

"A. *They were, in general, that the assistant engineer or inspector, whoever it was, should carry out the specifications and should look after the interests of the United States."* (Rec., 2842.)

The following shows the general character of the instructions given by Captain Carter to his employes:

To M. P. PARET, Asst. Engr., Jan. 19, 1889, C. S.:

"You will please inform the inspector that he will insist upon a proper compliance with the specifications in every particular. Should the contractor refuse to comply with his instructions, he will at once suspend operations." (Rec., 8357.)

In short, every care was taken to see that the work was carefully inspected, and that the specifications to the contracts were carried out.

S. M. Hale, a witness for the government, testifies of the brush used at Savannah:

"A. *There was nothing but oak and myrtle, and it was full of leaves." (Rec., 506.)

R. F. Ensey, the assistant engineer who built the first multiple mattresses used at Savannah, testifies that the fascines were made "of green brush." (Rec., 5307.)

Campbell Ford, a civil engineer who was an inspector on the big contract at Savannah, testifies of the fascines used:

"A. They were good fascines." (Rec., 3145.)

Ford also testifies that the brush used was "good," and the fascines "were well choked." (Rec., 3145.)

The government contends that the fascines built by Twiggs at Augusta were splendid fascines, made of splendid brush, and *Ford*, who was government inspector over the work done by Twiggs at Augusta, as well as government inspector over the

work done by Greene and Gaynor under the big contract, testifies:

> "Q. Now, was all the brush which went into the Twiggs fascines larger than any of brush in that new fascine?
>
> A. No.
>
> Q. And the difference in the character of the fascine was for what reason, for what cause?
>
> A. Merely from the character of the brush that was up there and which would average straighter.
>
> Q. Was the brush which went into the Twiggs fascine any more difficult to obtain and bind into a fascine than the brush such as you saw put into the fascines down here on the Cockspur Training Wall?
>
> A. I imagine up there it was easier to procure than the class of brush that was here, and possibly even easier to handle, too."

Carter left Savannah July 17, 1897, and without revisiting that place, sailed from New York on August 7, 1897, to assume his duties in London. (Def. Ex. 10-G.) On July 20, 1897, Gillette reached Savannah and officially assumed charge of that district. (Rec., 1095:3589.)

Prior to Gillette's reaching Savannah, no one claimed that Greene and Gaynor were furnishing less material than their contract required; every inspector had reported in writing, and "on honor," that the work was done in accordance with the contract (Ref. p. 196); and Cooper, the assistant at Savannah, had even made a special report concerning one of the mattresses used by Greene and Gaynor, saying:

> "I examined the mat carefully. * * * I found that the material in the mat was good, and there was apparently plenty of it." (Rec., 1223.)

Gillette, upon reaching Savannah, began to manufacture evidence for use against Carter, with the result that *Gillette*, and his employes *Cooper*, *Hale*, *Hall* and *Marion Twiggs* subsequently testified that under Carter less material had been used in the brush-fascine mattresses by Greene and Gaynor than their contract called for. *No other witness so testified!* The manner in which Gillette manufactured evidence, and caused his employes to testify against Carter will now be considered.

The record shows that "on July 30," 1897 (Rec., 1099), when Carter was in New York (Def. Ex. 10-G), Greene and Gaynor (who were then working under the orders of Gillette), were building an eight-course mattress for use at Cumberland Sound.

Gillette says that he "waited" for that mattress "over night" at Cumberland Sound; that "it did not get there until some time the following afternoon, then I inspected it" (Rec., 1100), and "was present when it was sunk" on July 31, 1897. (Rec., 1104.) Carter was still in New York (Def. Ex. 10-G.) On that same day of July 31, 1897, *Marion Twiggs* submitted a report in writing to Gillette, describing the manner in which Greene and Gaynor built their mattresses (B. E. Ex. 15); and *Gillette* says of the mattress which he built and inspected and sank in Carter's absence, that Marion Twiggs "told me that that mattress was as good as any" Carter had built. (Rec., 752.) *Gillette* then proceeded to manufacture further evidence against Carter. The written report of Marion Twiggs to Gillette, dated August 12, 1897 (B. E. Ex. 16), shows that on August 7, 1897, the very day Carter sailed from New York for Europe, Gillette ordered Twiggs to manufacture two mattresses, "an eight-course mat" which was to be considered as just like the mattresses Carter had built, and "a four-course mat" which was to be built according to Gillette's ideas of the specifications; and Gillette ordered Twiggs to weigh those two mattresses thus built, so as to ascertain how much less material Greene and Gaynor had been using under Carter than their contract required. Twiggs says that he built those two mattresses, and weighed them, and that he found from those weights that a so-called Carter mattress weighed only "51.02 lbs." to the "square yard," while the Gillette, or specification mattress weighed "115.95 lbs." to the "square yard." Twiggs then testifies that on "August 11, 1897," he sank both of those two mattresses in the ocean, one of them at "11:40 a. am.," and the other at "2 p. m." (B. E. Ex. 16.) During the entire period covered by these operations Carter was on the ocean *en route* to Europe. (Def. Ex. 10-G.) Gillette testified of those two mattresses that Twiggs *told him* the so-called Carter mattress was "as good in quality as the average previously sunk" by Carter (Rec., 443), and then Gillette testifies that his "measurements showed that the mattresses" accepted by Carter "contained about four-ninths of the material required by the specifications." (Rec., 442.) From his alleged "inspection" of the first mattress which he built on July 30, 1897, and which he says he inspected and sank on July 31, 1897, Gillette says that his measurements of his own mattress (but which he claims was just like Carter had built) show that Carter accepted from Greene and Gaynor mattresses in which "there was not more than two-fifths of the amount of brush" required.

(Rec., 10889.) *Upon those mattresses, which were built, measured and sank by Gillette while Carter was on the ocean, so that Carter might never see them, are based all of the testimony that Carter permitted Greene and Gaynor to use less brush in their mattress than the contract called for.* Not only did Gillette manufacture that evidence in Carter's absence, but Carter did not have any inkling of what Gillette was doing, and Gillette admitted in response to Carter's question before the board of engineers that from the time Gillette reached Savannah "I had no communication with you at all." (Rec., 644.)

Not content with thus manufacturing evidence that the *mattresses* accepted by Carter contained much less material than the contract called for, Gillette then proceeded to manufacture evidence that the *fascines* accepted by Carter did not contain the amount of brush required by the contract. Gillette did this in the following manner. The record shows that on "August 11th," while Carter was in Europe, Gillette instructed Hale to take some old bundles of brush "that the contractor has on hand," and to choke them, and Hale reported on August 13, 1897, while Carter was still in Europe, that those bundles measured "three and five-tenths feet in circumference" when he got them, and that after he had choked them they measured "two and one-tenth feet" in circumference (B. E. Ex. 20). The required circumference for a 9-inch circle is about 28 inches; hence 3½ feet or 42 inches was 50 per cent. more than the contract required, and the 2.1 feet (two and one-tenth feet) or 25.2 inches was only 10 per cent. less than that requirement. Hale does not state how many men he employed to choke those old fascines, but Hall, who was employed for similar work at Cumberland Sound, testifies that he put "three to four men on the levers" and choked the fascines so tightly that "in one case we cut off the end of the fascine." (Rec., 4218.) The evidence shows that the old bundles which Hall selected to represent Greene and Gaynor's fascines "had laid there at least three weeks, during which time they had been exposed to the weather" (B. E. Ex. 123-G), and Hall himself admitted that the fascines were not fairly chosen, saying:

> "When I went with Mr. Gieseler to get some fascines from the old mat camp near Fernandina, we took some poor looking ones from right close to the camp. I thought this was strange, as the contractor was hauling his fascines a long distance, and was not likely to leave fascines near the camp, unless he did not consider them good

enough to use, and had rejected them, or had omitted them for some reason." (Aff. p. 102.)

The report of Hall, giving his measurements made in the manner just described is dated "August 17th, 1897," which was while Carter was still in Europe (B. E. Ex. 18: Def. Ex. 10-G). In that report Hall states (and Gillette certifies to it) that the diameter of the old fascines when found averaged "11.56 inches," and that after choking them as he did they averaged "6.56 inches," which was only 27 per cent. less than the required diameter of 9 inches.

Those results did not suit Gillette, so he employed *Hale* to go to the old abandoned camps of Greene and Gaynor at "Foot Point" and "Hilton Head" South Carolina. Hale testifies that he, Keating and Austin got bundles from Hilton Head, and Austin testifies that "the camp was apparently abandoned" (Rec., 3245), that the old bundles were "dried out" (Rec., 3245), and that the brush fascines actually used by Greene and Gaynor in the work "was probably from two to five hundred per cent. better." (Rec., 3244.) Hale says he was employed by Gillette to make fascines "according to the specifications" (Rec., 1302) "as interpreted by Captain Gillette" (Rec., 1107); that he then took some "old bundles" from an "abandoned" camp, which bundles had been "left over" by Greene and Gaynor; and "I had those bundles trimmed, and made fascines out of them," so as to see how many it would take to make one of Gillette's ideal fascines (Rec., 1304, etc.). Hale says:

"A. I cut the bundles open, and picked out such parts as I thought could be trimmed properly to make fascines." (Rec., 1304.)

"Q. All the material that was used in those bundles you did not find serviceable, I understood you to say?

A. No, sir.

Q. Why was it not serviceable?

A. Because it was mostly twigs and leaves." (Rec., 1305.)

After cutting out and throwing away such material as he desired to get rid of Hale testified that in this manner he figured that it would take "eight" of Greene and Gaynor's fascines to make one of Gillette's (Rec., 1305), *i. e.*, that Greene and Gaynor furnished only one-eighth of the brush required by the contract.

S. M. HALE testifies that he was discharged by Carter on "the 7th of June, 1897" (Rec., 1301), and was employed by Gillette "on August 1st, 1897." (Rec., 1301.)

"Q. Have you been inspector of brush mattress in this district?

A. Only at one time; that was in Augusta.

Q. Who was the contractor?

A. Twiggs,—Albert Twiggs." (Rec., 504.)

"Q. Have you seen the brush mattresses built on the lower river, on the sea coast of this district?

A. I have never been over one.

Q. You were not familiar with them?

A. No, sir." (Rec., 504.)

Hale's report to Gillette states that the old fascines he found in the camps of Greene and Gaynor were "three and five-tenths feet in circumference," and that after he had "tightly choked" them, they measured "two and one-tenth feet in circumference" (B. E. Ex. 20), *i. e.*, only 10 per cent. less than the contract called for. That written report of Hale was made on August 13, 1897, and before the courtmartial on January 22, 1898, Hale testified of those same fascines and of those same tests:

"Q. How many of those bundles would it take to choke into a 9-inch tightly choked bundle of equal length?

A. I suppose three or four.

Q. Did you find this out?

A. I tested that." (Rec., 1304.)

Regarding the "old bundles" which Hale says he found and remade by throwing away much of the material, Hale testifies:

"Q. How many bundles did you find there at the landing?

A. I suppose there were 8,000 or 10,000 bundles." (Rec., 1307.)

"Q Did you find any bundles that you could not make anything out of at all?

A. Yes, sir, some we did not use." (Rec., 505.)

"A. I cut the bundles open, and picked out such parts as I thought could be properly trimmed to make fascines." (Rec., 1303.)

"Q. Were you not informed that fascines, in order to come up to the specifications, should come up to the fascines which were shown you as a type?

A. Yes, sir; I was to carry out the specifications.

Q. As interpreted by Captain Gillette?
A. Yes, sir." (Rec., 505.)

"Q. How many 15-foot bundles would you have to use to make 15 feet of a fascine?
A. Eight,—about eight." (Rec., 1304.)

Hale testifies that it "took 10,000 bundles, 10,000 he had on hand" to build "two mattresses, 100x50" (Rec., 505), yet Hale testifies some four months later that out of the old "8,000 or 10,000 bundles" on hand he made "six" mattresses, saying:

"Q. How many single course specification mats were made under your supervision?
A. Six.
Q. How many did you have made out of the bundles you found at the landing?
A. Six." (Rec., 1303.)

Hence we see that on August 13, 1897, Hale made a written report that one of the old Greene and Gaynor bundles, after being choked by him as he thought the specifications required, made a fascine which had only 10 per cent. less in circumference than the contract required; then some five months later, Hale testified that those same tests showed that it required "three or four" of the old bundles to give the circumference required by the contract! Again, on September 22, 1897, Hale testified before the board of engineers that on account of having to cut off and throw away so much of the old bundles it took 10,000 bundles to build "two" mattresses, 100 by 50; yet, on January 22, 1898, Hale testified before the courtmartial, that out of "8,000 or 10,000 bundles" he made "six" mattresses, and that each mattress was "50 by 100 feet." (Rec., 1298:1302:1304.)

Hale testified further as to his alleged 8,000 bundles:

"Q. Do you know where those bundles were made?
A. In the vicinity of Foot Point, that is within a mile." (Rec., 1305.)

"Q. Do I understand you to say that it took eight bundles, as prepared and cut up, to make one according to the specifications, of the same length?
A. Yes, sir." (Rec., 1311.)

"Q. First of August, 1897; was not that the very first opportunity you had ever had, in an official or responsible capacity, on mattress or fascine construction?
A. Of building a fascine, that was the very first." (Rec., 1317.)

"A. * * * Captain Gillette told me those fascines must be tightly compressed by an approved choker." (Rec., 1317.)

Cooper testifies that Gillette employed Hale on his recommendation (Rec., 1186); and that Hale had never been there at any other time. (Rec., 1187.)

That Hale's tests of the fascines on hand in the woods and belonging to Greene and Gaynor were made by the orders of Gillette is shown by the testimony of Gillette himself, who says:

"I have since had tests made of the bundles of brush which the contractor had on hand, and I will submit them. This is in the form of a letter from an inspector in the brush camp, Mr. Hale, in which he says that he measured the bundles of brush that the contractor had on hand, and then tightened them and choked them properly; before choking they measured 3.5 feet, and 2.1 feet after choking, in circumference. Mr. Hale is the inspector that I placed in the mattress camp." (Rec., 443.)

That testimony of Gillette was given on September 22, 1897. (Rec., 440-43.)

In referring to the two mattresses which Twiggs built under the orders of Gillette (B. E. Ex. 16), and from a comparison of which Gillette testifies concerning the mattress which he built to represent the mattresses Carter had accepted from Greene and Gaynor; that:

"Measurements showed that the mattresses contained about four-ninths of the material, of the quantity of the material required by the specifications." (Rec., 444.)

And Gillette then testified as follows:

"Height of 8-course mat constructed like the one shown, but containing the amount of material called for by specification, third design, 21 feet 8 inches." (B. E. Ex. 14.)

That height would be 260 inches, and deducting the 30 inches of grillage poles which Gillette says the mattress had, would leave 230 inches of brush for eight courses, or a thickness of 28 inches of brush to the mattress, when, as a matter of fact, the specifications called for only nine inches!

Cooper is the only remaining witness on the quantity of material, and he does not state how he arrived at his guess

that only one-eighth of the required amount of material was used by Greene and Gaynor, but as Cooper's figures are the same as Hale's Cooper probably took the figures of Hale. (Rec., 1210.)

This completes the list of the witnesses that Greene and Gaynor did not furnish the amount of material required by their contract, and it shows that all of such testimony is based upon fascines or mattresses manufactured by Gillette and then placed where Carter could never see them, and that not one measurement is based upon any work actually done under Carter's supervision, or on any work which Carter ever saw.

When the board of engineers was considering the charges of Gillette that Carter had permitted Greene and Gaynor to use less brush than the contract called for, the only evidence to that effect being the comparative weights of two mattresses, both of which were built by Gillette and then sunk in the ocean so that no one could see them, a protest was made by Carter, as follows:

> "CAPTAIN CARTER. * * * this is a mattress which I have not seen, and the truth or falsity of which statement that it is an average mattress I am not advised; * * * it seems to me that this is hardly a fair proposition to make, to have an estimate on that mattress, as described by Captain Gillette.
>
> COLONEL GILLESPIE. The weight of the two types is governed by the relative quantities of brush in each type.
>
> CAPTAIN BLACK. We will suppose that the conditions were the same, that the brush was cut at the same time.
>
> CAPTAIN CARTER. I mean that the conditions were not the same, and the brush was cut six weeks before it was used, in one case." (Rec., 707.)

Captain Carter continued to protest to the board against the use of a mattress built by Gillette, and which Carter was never permitted to see, as representing the mattress actually used under Carter, saying that to use

> "a mattress built upon the statement of the men here, my assistants who have, since coming under the influence of Captain Gillette, made different statements from what they made before, it seems to me that it is rather hard." (Rec., 751.)

Major Raymond then asked Gillette the following:

> "Q. How do you know, Captain Gillette, that the inspector, after Captain Carter left, required the same thing that they did before?

CAPTAIN GILLETTE. The assistant engineer, whom I found in charge, told me that the mattress was as good as any.

Q. Who is the assistant engineer?

A. Marion Twiggs is the man. He began with the work and went through with it; that is, the entire contract he has been in charge of.

Q. There is no reason in the world to believe that he should make any statement that is not true in regard to the construction of the mattresses?

A. None that I know of."

* * * * * *

MAJOR RAYMOND. I thought you said once, Captain, he was a brother of a disappointed contractor?

A. Yes, he is." (Rec., 752-6.)

Major Adams desired that Captains Black and Gaillard make estimates of the cost of the mattresses Carter permitted Greene and Gaynor to use, on the assumption that the mattress built by Gillette out of old abandoned brush, in Carter's absence, represented what Carter actually accepted from Greene and Gaynor. Carter's protest was overruled, and Gillespie permitted the desire of Adams to be carried out, saying:

"COLONEL GILLESPIE. I am perfectly willing to assent to the request of Major Adams that the cost of that particular mattress be estimated, if you can estimate it." (Rec., 752.)

"COLONEL GILLESPIE. Captain Black, you were requested yesterday to kindly prepare certain estimates for the use of the board. Have you got the results of your work?

CAPTAIN BLACK. Yes. They furnished me certain reports of a drawing, a tracing. Those were taken as the basis, or as a description, of a mat called in the reports, mat number 3—old style.

(Captain Black read in evidence a detailed estimate prepared by him, which is marked file No. 99.)

CAPTAIN BLACK. (Reading the last few words of his estimate) "3,332 square yards, or 33.8 cents per square yard."

MAJOR RAYMOND. That is the number 3 design?

CAPTAIN BLACK. Number 3, old style, as it was called in Mr. Twiggs' report.

CAPTAIN CARTER. The kind it is claimed that I built?

A. It is claimed to be that." (Rec., 806.)

Captain Gaillard then read his estimate, which is marked file No. 100.

In that estimate, he gives the cost of the mattress which Gillette built to represent Carter's, as 34 cents per square yard:

> "according to data furnished by Mr. Marion Twiggs, assistant engineer, August 12, 1897, *i. e.*, that the ratio of the weights of the old and new style mats per square yard was 2.27, and that this ratio represents the relative amounts of brush used in the two styles of fascines."

That a comparison by weight is unfair is shown as follows:

> "CAPTAIN CARTER. You figured out in one way that the cost would be proportionate to the displacement, or in other words, to the weight. Suppose you were building those fascines: in one case you built them, say, of myrtle, and in another case you built them of black jack, the weight being as 1 to 3; would that be a true guide?
>
> A. That would make a very great difference." (Rec., 807.)

The brush used in the so-called Carter fascines was cut "six weeks" before that in the Gillette fascines, and Gillette admittedly used only bare poles, probably of live oak!

Black and *Gaillard* estimate the cost of a mattress containing only 4/9 of the required material at 33.8 cents and 34 cents, which is a cost of 76¼ cents per square yard for the materials required and actually used.

Gillette attacks the estimates of Black and Gaillard, saying "the cost of many items is greatly overestimated." (B. E. Ex. 140 H.)

Gillette then causes his employes Hale, Twiggs, Keating, Cooper and Gieseler to estimate the cost of the very mattress which Black and Gaillard estimated at 34 cents per square yard, as only from 9 to 13 cents per square yard; and the government has abandoned the figures of Black and Gaillard.

—15—

BIDDING FOR THREE KINDS OF MATTRESSES AT THE SAME PRICE.

The complainant contends that it was unfair to call for three kinds of mattresses, to be bid for at the same price per square yard, because, it is asserted, the log mattress (which Carter did not use) cost very much more than the brush mattresses (which he did use).

The three mattress designs cost the same per square yard; and, as all contractors knew the three mattress types cost the same per square yard, and as the proposed work was to cover several years in its execution, and as it was a very difficult work, it was only the part of wisdom to provide for all three mattress types, at the same unit of cost, so that the engineer in charge might use the type experience proved to be the best, without placing the Government in the position of paying more for the best type, as might have been the case, had the course chosen not been pursued. (Rec., 9305-06.)

The Chief of Engineers decided that all three mattress types cost the same per square yard. This is conclusively shown by the fact that he ordered Carter to call for bids in that way.

That order is the official plans and specifications, signed by the Chief of Engineers before any bids were asked for. It is Exhibit 78, which says in paragraph 38, as follows: *"One price only should be given in the proposals and the price so stated will be understood as referring to any of the designs which may be required by the Engineer Officer in charge."*

The following testimony proves that all three mattress types cost substantially the same per square yard, and that it was perfectly proper and fair to call for one price on all three designs.

GEORGE Y. WISNER, an engineer of large experience as a contractor, as well as an engineer, testifies in Carter's favor:

"Q. * * * If the three designs had been open to a separate bid on each, would you, as a bidder, have bid any different price for the three designs?

A. I would not.

Q. Could you, from those specifications in the two contracts, have prepared an intelligent bid on the work, knowing the local conditions?

A. Yes, sir." (Rec., 2625.)

L. Y. SCHERMERHORN, an engineer and contractor of large experience, and a competitor of Greene and Gaynor, testifies in Carter's favor:

"Q. Did you make any difference in the bid put in by you because there were three designs, in the bid for the mattresses put in by you, because there were three designs, and that the engineer had the option to use either one of them under the specifications?

A. I did not.

Q. Why?

A. Because, in my judgment, there would not be an essential difference in the cost of either of the three designs, at least within such margins as would not be covered by the element of contingencies which must enter into any contractor's estimate of the cost of the work." (Rec., 12428.)

MAJOR F. A. MAHAN, U. S. Engineers, testifies in Carter's favor:

"Q. It was provided in the specifications that but one bid on the three types was desired. The specifications left it to the Engineer Officer in charge as to which type he would use. If it should appear that these three designs cost about the same to manufacture, or if it should appear that contractors generally would bid the same for each of the three designs, and have so bid, I will ask you whether or not in your opinion as an engineer, it was proper to call for one bid on the three designs, and proper to leave it to the discretion of the engineer as to which of the three designs he would use?

A. I think it was thoroughly proper that he should do so and it is one of those questions which can only be determined by the engineer as the work goes on, whether he will use one mattress, or another. The different mattresses will meet different purposes, and I think he only exercised a wise discretion in reserving the right." (Rec., 3061.)

MAJOR F. V. ABBOT, Corps of Engineers, in charge of the improvement of Charleston Harbor, testifies in Carter's favor, concerning the three designs:

"Q. * * * Will you kindly tell me whether or not you consider that these mattresses cost approximately the same, or whether they vary materially in cost?

A. I was uncertain when I advertised for the Winyaw Bay work, hence, called for the price of each design. The bids as actually received for the three designs showed that the Alabama Dredging and Jetty Company bid *the same price for all three designs, which were practically identical with Captain Carter's.* That was 65c for all three. The Stewart Construction Company of Columbia, South Carolina, bid 60c for the first and third designs, and 62c for the second. McArthur Bros. of Chicago bid 90c for the first, 94c for the second, and 92c for the third.

Mr. George W. Egan of Charleston bid 62c, 68c and 67c. Mr. John L. Grim bid 95c for all three patterns. Mr. Friday bid 90c for the first two, and 85c for the third design. Mr. Roderick G. Ross bid 57c for all three designs." (Rec., 811-12.)

Major W. M. Black, Corps of Engineers, a witness for the Government, in an estimate made for the Board of Engineers, contradicts the complainant's present claim that the log mattress cost more than the brush mattresses, saying:

"Based on contract of 1886 at St. Johns bar, Florida, design one, Savannah District, would cost 45c per square yard.

Based on prices of labor and materials of mats made by hired labor at St. Augustine, Florida, 1889-1890, and cost of spikes and superintendence at St. Johns bar, Florida, designs two and three of the Savannah District, would cost practically the same amount, 60c per square yard in the jetty, exclusive of cost of stone ballast." (B. E. Ex. 99.)

Major Black testifies further:

"Q. What is the relative cost, so far as your experience goes, of a mattress of the first and second design per square yard?

A. At the mouth of the St. Johns, as far as I recollect, the contract price for the log mattress, which I think is termed the first design, was about 45c, and of the brush mattress the contract price was 70 to 75c.

Q. Then the log mattress is cheaper?

A. Cheaper.

Q. Is that shown in the contract prices?

A. Yes, sir.

Q. At the St. Johns?

A. Yes; at the St. Johns." (Rec., 2564-65.)

"The Witness: The third type should have cost about the same as the second, the difference being that in the second type, the top and bottom grillages could be made of one layer of poles only. In Captain Carter's third design the top and bottom grillages were to be of two layers of poles, but the top layer of fascines at intervals of six feet was omitted, so that it would amount to about the same thing.

Q. You mean that the cost of the second and third types were about the same?

A. They ought to have been about the same, Colonel. I have not made any figures on it. *There could not be much variation.*" (Rec., 693.)

MAJOR D. DU B. GAILLARD, Corps of Engineers, a witness for the Government, testifies in Carter's favor concerning the three designs:

"A. The second type of mattress would cost the most, and *the third would be practically the same.*" (Rec., 725.)

"The Witness: The log mat was there the cheapest at contract prices." (Rec., 725.)

LYMAN E. COOLEY, a prominent civil engineer of Chicago, testifies in Carter's favor as follows:

"Q. Criticism is made upon Captain Carter, that the plans and specifications called for three designs of mattresses, first a mattress made of saw-logs, second a mattress called the second design, made of brush and poles, and third, a mattress of the third design made of brush logs and poles, in a little different form from the one in the second design, and that the contract requires the contractor to bid the same price on each and authorizes the engineer in charge to call for whichever he thought the work required. That contract appears to have been let in the following way: the Chief of Engineers received work from the War Department that an appropriation had been made for the improvement of Savannah Harbor; he thereupon instructed Carter in writing to submit plans for the improvement of that Harbor. Carter submitted those plans. Those plans contained this feature that Mr. Erwin now claims was objectionable, namely, that the contractor should bid the same price upon the different designs of mattress, and that the engineer in charge should be entitled to call for as much of each as he saw fit. Those plans were submitted in writing by Carter to his Division Engineer, who was his superior officer, and then to the Chief of Engineers, and that after both the Division Engineer and the Chief of Engineers had gone over the proposed plans and changed them as they saw fit, the Chief of Engineers approved the plans and specifications in writing, and then instructed Carter in writing to prepare an advertisement for bids based upon those plans and specifications, which Carter did. That advertisement for bids was prepared by Carter in writing,

and stated the date when bids would be opened, he sent the advertisement for bids to the Chief of Engineers, who made such changes in it as he saw fit, and then approved it in writing and returned it to Carter, not only with directions as to publishing it in the newspapers, but stating the exact papers in which it should be published. Carter promptly inserted those advertisements, and on the day appointed for the opening of bids, he was present and the bidders were present in the same room, and immediately before the time expired for bidding, the bidders had placed their bids on the table in front of Carter, and as soon as the clock struck the hour, Carter announced that the bidding was closed, and then he proceeded, one by one, to open the bids, in the presence of everybody, and his clerk made a record of them, and whenever any bidders desired to look at the bids of any bidder, they were permitted to do so, and he found that the bid of Greene and Gaynor for the jetty work was the lowest, and the bid of P. Sanford Ross for the dredging work, was the lowest, and he so announced; then he sent those bids to the Chief of Engineers with the recommendation that the bid of the lowest bidder be accepted, and the Chief of Engineers took the matter under consideration and himself accepted the bids of Greene and Gaynor and P. Sanford Ross, and ordered Carter to make contracts with them in accordance with the specifications, which Carter did. Those contracts provided that they should not be binding until they were approved in writing by the Chief of Engineers. Carter then sent the contracts to the Chief of Engineers and they were by him approved in writing. Under those circumstances would you consider that Carter was responsible for the provision in those specifications as to asking the contractors to bid for the three mats at the same price?

A. No more so than his superiors.

Q. If there was anything wrong about that the superior officers would know about it under those circumstances, or ought to know, would they not?

A. They would share in the responsibility; in fact *they would assume the responsibility.*

Q. Now, suppose the prior bidding on those different designs of mattresses had showed the prices bid were about the same, would that show that the putting of that provision into the contract was justified or not?

A. The several styles of mattress?

Q. Yes.

A. Surely, it must be presumed that, when they were put in to be bid in the same way, that there was no material difference in the cost and that the purpose was to give large elasticity to the use of material and methods.

Q. And the fact that Carter's superior officer, the Division Engineer, and his superior officer, the Chief of Engineers, approved the contract in that form, would lead an engineer to believe, would it not, that all three of them supposed the mattresses cost about the same price to the contractors?

A. That would be the significance of it, that they substantially cost the same.

Q. And if to that is added the testimony of several witnesses to the effect that the mattresses cost about the same price, that would still further strengthen that idea, would it not?

A. Yes, sir.

Q. The testimony shows that after this advertisement for bids was made, that various bidders interviewed Captain Carter on the subject, and in every instance they testify that he gave them all the information that they asked for with regard to this work, and that he substantially told them that he should probably use all brush mattresses and not to call for any mattresses of the first or second design. Would that be proper conduct on his part, if he thought that was what he should do?

A. Yes, sir; provided that they all had the same information.

Q. If, as is the case here, no contractor made any complaint about obtaining any information, you would assume that all had all the information that they wanted, would you not?

A. That would be the presumption.

Q. Practically all the contractors who bid on that work testify that they interviewed Carter and that he told them he would probably use brush mattresses, that would indicate, would it not, followed by the fact that he did use brush mattresses, that he told everybody the truth and told them as nearly as he could tell exactly what would happen?

A. That is correct.

Q. In view of the fact that the experience in Savannah Harbor prior to the contract of 1892, had been that log

mattresses could not be used to advantage in some places, owing to the fact that they had to be loaded with stone, and that when so loaded they sunk away down sometimes 70 feet into the soft bottom, would it be to the advantage of the Government to insert those provisions in the plans and specifications, that the engineer in charge might call for other log mattresses, or brush mattresses, whichever he thought was to the best interest of the work?

A. It would be.

Q. *Would it not have been very much to the prejudice of the Government if a contract had been let for a large amount of log mattresses and a large amount of brush mattresses, and then it subsequently developed that they could not use the log mattresses?*

A. *That is conceivable, that it might make the work impossible.*

Q. As a matter of fact, the plans and specifications which call for log mattresses and brush mattresses, at the option of the engineer in charge, where the use of log mattresses had been unfortunate in some cases and where the use of brush mattresses—it was impossible to tell how many would be used, the putting of those two into the contract and giving the Government or the engineer in charge the option of selecting whichever they wanted, would be very largely to the benefit of the Government, would it not?

A. Yes, sir; in fact I assume that that policy in the specifications was dictated by the necessity of the work.

Q. You are assuming also that the prices usually bid by contractors on those two kinds of mattresses would be substantially the same?

A. Surely, I think a contractor in approaching that specification would be in this attitude; that the substantial thing was the yardage which he was to handle, and it might vary through all the limits of possible mattress construction; these three types being a matter if illustration.

Q. If the bids by contractors prior to that time for these designs of mattress, had been about the same for each, there would be no prejudice to the Government in requiring them to bid the same price for each, would there, and giving the Government the option to call for whatever they pleased?

A. *As long as experience had shown that there was no*

material difference in the cost of these types, there would be no prejudice." (Rec., 8542.)

J. W. RUTHERFOORD, an engineer and contractor of long experience in such work, and a competitor of Greene and Gaynor, testifies in Carter's favor:

"Q. Would you have made any difference, Colonel Rutherfoord, had you known that one design rather than the other was to have been used entirely?

A. *No; made no difference whatever;* it was a very small matter in the totality of the contract.

Q. And they were practically of the same cost?

A. Practically of the same cost; yes." (Rec., 12889.)

"Q. Did you have your bid prepared, the figures in it?

A. I did.

Q. Have you any objection to telling us what price you proposed to bid for mattresses?

A. None whatever. $1.05 per square yard was to be my bid.

Q. Was that a reasonable, fair price, considering the cost, and a fair profit to the contractor?

A. That I considered it.

Q. Was that price bid on all three designs?

A. It was with the privilege of choosing either.

Q. On whose part?

A. On the part of the engineer, to be sure.

Q. And what in your judgment—was there any particular difference between the cost of the three designs?

A. I did not consider there was very much, they did not all cost exactly alike according to my computation. Still, as I had the engineer's statement that the majority to be used were of a certain class, and a few of the other sort to be used, I didn't make any particular difference in that.

Q. *The cost of the three was practically the same?*

A. *Very closely."* (Rec., 3160.)

C. P. E. BURGWYN, a civil engineer of prominence, and a contractor of long experience, who was a competitor of Greene and Gaynor, testifies in Carter's favor:

"Q. Did you ascertain at that time or before as to the relative cost of the three designs of mattresses bid here?

A. *I investigated very thoroughly;* yes.

Q. And what did you find that was, the relative cost of the three designs.

A. Well, *I did not think there was very much difference between them, if any;* I did not think there was much difference in them." (Rec., 12939.)

P. SANFORD ROSS, a contractor of great and long experience, and a competitor of Greene and Gaynor, who bid on the work against them, testifies in Carter's favor:

"Q. What have you to say with reference to the cost of the mattresses, taking into consideration the situation of the work and the requirements of the specifications as to the cost, as to their being nearly alike, or otherwise?

A. As I recall, *there was not a great difference in the cost.*

Q. *So that one bid would cover all?*

A. *Yes.*" (Rec., 12919.)

"The Witness: Mr. Ely figured up the details before I arrived." (Rec., 3766.)

"The Witness: I think that he figured the different designs so as to see if there was any preceptible difference.

Q. With what result?

A. With the result that a uniform price was made." (Rec., 3766.)

A. R. STEWART, a contractor of much experience, and a competitor of Greene and Gaynor, testifies in Carter's favor:

"Q. Do you know the relative cost of designs number 1 and number 3?

A. *I don't think it would make any difference, comparatively, in making the bid.* Of course, it would depend on the locality, the stuff varied in different localities. If you could get the stuff in number 1 and number 3 in the same neighborhood, it would not make much difference in prices." (Rec., 653.)

JAMES A. BRYAN, an experienced contractor, who was familiar with the work, and who was a competitor of Greene and Gaynor, testifies in Carter's favor:

"Deponent has made, and seen made, log mats, brush fascines, and brush mats at various places on the South Atlantic coast. He is familiar with the mat work done at Mayport and at Fernandina, and with the specifications for them. Deponent knows the three kinds of mats de-

scribed in the specifications, and knows *they cost about the same a square yard, the log mat, if anything, being a little cheaper.*" (Rec., 1034.)

E. L. FRIDAY, a contractor of great experience, who built the great harbor works at Charleston, and who was a competitor of Greene and Gaynor who actually bid on the works, testifies in Carter's favor:

"Deponent is familiar with mattress construction, and was perfectly satisfied to build either grade of mats, at the same price, *their cost not varying materially.*" (Rec., 996.)

RODERICK G. ROSS, a contractor of great experience, who built and designed the first fascine ever used on the Atlantic coast, at Mayport, Florida, in 1888, and who was a competitor of Greene and Gaynor, testifies in Carter's favor:

"In deponent's judgment *the three designs of mats cost about the same; the brush ones, however, cost something more than the log ones.*" (Rec., 1019.)

But even if all of the foregoing were not so, still all bidders stood upon the same footing, because it has been seen in Reference 2 that the competitive bidders all know it was probable the third design of brush mattress would be used, and that design was actually used in the work.

The competitors of Greene and Gaynor who testify they understood the third design mattress would probably be used are:

P. SANFORD ROSS (through his agent, C. C. ELY); W. F. MCCAULEY; L. Y. SCHERMERHORN; J. W. RUTHEPFOORD; A. R. STEWART; J. R. GRIM; and RODERICK G. ROSS. (See Ref. No. 2.)

P. Sanford Ross, W. F. McCauley and L. Y. Schermerhorn are the three unsuccessful bidders against Greene and Gaynor on the big contract. (C. M. Def. Ex. 24.)

Another contention by the complainant is that because General Gillmore specified two designs of mattresses, and permitted the contractor to choose the design he would use, Carter ought to have done likewise.

The evidence shows that one of the designs specified by Gillmore had been patented by some contractors (Rec., 86873), hence he specified an alternate design, so that the contractor owning the patent for one of the designs should not have a monopoly.

Carter specified two designs also, until the patent on one

of the designs expired. (Ex. 76, etc.) After it had been learned that brush mattresses could be bought at a reasonable price, the better plan was then adopted by the Chief of Engineers of having the United States, rather than the contractor, choose the design to be used. (Rec., 8305.)

For further details, see (Rec., 8303-10).

—16—

USING BRUSH MATTRESSES INSTEAD OF LOG MATTRESSES.

For the evidence that Carter reported to his superior officers every month in writing just what materials he was using, and where he was using them, see (N. Y. Def. Ex. U-5 to Z-5; A-6 to Z-6; A-7 to I-7).

We have seen, in the foregoing Reference (No. 15) that the Chief of Engineers decided log and brush mattresses cost about the same, and that he ordered Carter to pay the same price for each. We have also referred to the testimony of numerous engineers, some of whom were government witnesses, that both kinds of mattress cost about the same.

But as the complainant bases its entire case on the claim that log mattresses cost the more, and that Greene and Gaynor paid vast sums to induce Carter to let them use brush mattresses, because, as the complainant claims, brush mattresses were the cheaper, *Carter has produced additional evidence, which proves beyond a doubt that brush mattresses were the more expensive of the two, and that, hence, Greene and Gaynor could not have paid him any money to call for such mattresses, as it is contrary to all human experience that they would bribe him to call for the more expensive mattresses of the two.*

That evidence is long and tedious, but as it utterly destroys the complainant's entire case, it is of the greatest importance.

That evidence consists in showing the relative cost of the two kinds of mattresses, step by step, from the time the brush for one, and the saw logs for the other, originally stood in the woods, up to the time each mattress reached its final place in the work.

Those steps (considered per square yard of mattress) are as follows:

(a) The raw materials for the brush mattress cost the more.

(b) Getting the brush logs ready to haul is more expensive than getting the saw logs ready to haul.

(c) Loading the brush logs on wagons is the more expensive.

(d) Hauling the brush logs is the more expensive.

(e) Unloading the brush logs from the wagons is the more expensive.

(f) Carrying brush logs on to barges is more expensive than rolling saw logs into the river.

(g) It takes more material for binders for the brush-log mattress than for binders and loose brush for the saw-log mattress.

(h) Making brush logs into mattresses is far more expensive than making saw-logs into rafts (mattresses).

(i) Towing brush mattresses on barges (including the return of the barges) is more expensive than towing saw-log rafts in the water.

(j) The unloading of brush-log mattresses from the big barges is a difficult and expensive operation. After being unloaded, the two kinds of mattresses are sunk in the same way, *i. e.*, by having stone thrown on them until they sink. Hence, the *unloading and sinking* of the brush mattresses is the more expensive.

Those matters will now be considered in detail.

In making the following comparison, the relative cost of eight single saw-log mattresses, and of an 8-course multiple brush-log mattress, of the same size, will be considered.

Each mattress or raft will be taken as fifty by one hundred feet in size.

A.

As brush logs were required to be 9 inches in diameter, it took 133 laid side by side, to make a mattress 100 feet wide (Rec., 8097); and as the 12-inch saw logs were crooked and had knots on them, it took only 65 of them, laid side by side, to make a raft 100 feet wide, *i. e.*, one-half as many saw logs as brush logs. (See testimony of Clarke and Wisner hereinafter quoted.)

The brush for 100 feet of brush log cost little, when standing on the ground. The 50-foot saw log cost in Georgia, at that time, a little over 8 cents, when standing in the tree. (See testimony of Clarke, Pate and McDonough, hereinafter quoted.)

The cost of the twine to make 100 feet of brush log was 25 cents. (Rec., 8094.)

It thus appears that while the saw log cost 8.3 cents, the twine for the brush log cost 3 times as much.

The spikes for 8 saw log mattresses cost $48. (Rec., 8095.)

The wire for an 8-course brush-log mattress cost $66.60. (Rec., 8095.)

The binder poles and loose brush for the mattresses are considered in detail hereinafter in paragraph G.

This comprises all the raw materials used in the two mattresses. (Ex. 78; § 38.)

J. D. CLARKE, a lumber dealer of Georgia, testifies:

> "Loblolly stumpage was not to exceed 20c per thousand board measure." (Rec., 4510.)

J. J. MCDONOUGH, a lumber dealer of Georgia, and a witness for the Government, testifies:

> "Loblolly trees 50 feet in length and average diameter of 12 inches, and being about 9 inches at the small end; * * * such a tree would when sawed * * * make about 416 feet board measure." (Rec., 4511.)

Four hundred and sixteen feet of log at 20 cents per thousand would be 8.3 cents for that log when standing in the tree.

Pine trees in Georgia were very cheap in those days; even best Georgia pine was worth only $1.00 per thousand stumpage (including land and all), which would make a 50-foot log of good Georgia pine, containing 416 feet board measure, worth only 41 cents, not deducting the value of the land.

D. S. PATE testifies that such a Georgia pine log cost "about 41 cents" (Rec., 8518), and that a loblolly log, such as the contract called for, was worth only one-fifth as much, saying "at that time that would be about the comparative difference." (Rec., 8518.)

It therefore appears that the cost of the tree, standing in the woods, from which the 50-foot loblolly log is cut, is 8.3 cents, while the cost of the tarred rope for binding 100 feet of brush log is 25 cents.

J. D. CLARKE, a lumber dealer of Georgia, testifies with regard to the 50-foot logs, that:

> "About 65 thereof, of an average of at least one foot in diameter, would make a width of raft of 100 feet." (Rec., 4509.)

G. Y. WISNER, a civil engineer of large experience, when asked how many 12-inch logs it would take to make a width of 100 feet, testified:

"A. Sixty-six, above or below.

Q. In one hundred feet, sixty-six?

A. Yes." (Rec., 12115.)

For further details, see (Rec., 8091-95).

B.

After purchasing the materials, *i. e.*, the brush standing on the ground, and the trees and poles standing on the ground, and the rope, wire and spikes, then the trees and the brush must be cut down, and the trees trimmed, and the brush manufactured into logs, so that the saw log and the brush log may be made ready for the teams to haul to the water, where they are to be shipped to Savannah.

The evidence shows that one man (in one day) can cut down and trim trees enough to make 20 saw logs 50 feet long, *i. e.*, 1,000 lineal feet of saw logs. But one man can only cut the brush and manufacture (in one day) 250 feet of brush logs, *i. e.*, one-fourth as much.

J. D. CLARKE testifies concerning 50-foot loblolly logs, 12 inches average diameter, that:

"An average man cuts and gets ready to haul at least 20 of said logs per day." (Rec., 4510.)

RUFUS HABERSHAM, a witness for the Government, testifies concerning the manufacture of brush logs:

"Q. You worked yourself in making the bundles?

A. Yes, sir.

Q. How many men with you?

A. Had two besides myself.

Q. What part of the work did you do?

A. He give me the head of a bench.

Q. What did the other two men do?

A. One was chopping and the other one held the choker while I tied the bundles.

Q. How long were the bundles you were required to make?

A. Fifteen feet.

Q. How large through?

A. Twelve inches through.

Q. How many bundles a day were you required to make?

A. They allowed fifty bundles for our day's work." (Rec., 1813.)

Fifty bundles, each 15 feet long, equal 750 feet for three men, or 250 feet for one man.

Hence it costs four times as much to get the brush log ready to haul, as it does to get the saw log ready to haul. (Rec., 8096.)

C.

The evidence shows that saw logs are hauled under the axles of wagons near the ground, while brush logs must be lifted up into racks above the wagon axles. The evidence shows that three men are required to load brush logs, while only one (or sometimes two) are required to fasten the saw log under the wagon. Moreover, it takes longer to load the brush logs.

P. E. Twiggs, a witness for the Government, when asked how many men it would take to carry a 15-foot fascine, testified:

"A. * * * It would take two or three, and I have seen four men take hold of a fascine." (Rec., 483.)

Thomas R. Lyon, a lumber dealer of Chicago, testifies that:

"A. The saw logs are * * * jacked up under the wheel.

Q. The evidence here shows that the brush logs are hauled on top of axles or racks?

A. Yes." (Rec., 5337.)

The cost, therefore, of loading the brush log is the greater. (Rec., 8096.)

D.

The evidence shows that a team can haul one 50-foot saw log at a load, and can haul 15 of the 15-foot brush logs at a load. But the brush log must be hauled two and one-half times as far as the saw log, because the saw log stands close to the river bank, while the brush is back from the river bank.

Thomas R. Lyon testifies:

"Q. * * * What would be the comparative cost of hauling per mile one saw log, or fifteen brush logs?

A. The actual hauling of the brush logs would be a little greater than the big wheels, because a span of horses can handle a pair of big wheels easier than they could handle trucks; that is the question of hauling, you understand." (Rec., 5337.)

C. C. COLE, who had charge of making the mattresses, testifies:

"Q. How many fascines could one of these big heavy mule teams haul?

A. From 14 to 16, average about 15.

Q. Fifteen-foot fascines?

A. Yes, sir." (Rec., 4502.)

"Q. How many 50-foot logs, say 1 foot in diameter, did they usually haul to the water?

A. One.

Q. That is the usual load for an average team?

A. Yes, sir." (Rec., 4502.)

Concerning the distance of brush logs (fascines) from water, Cole testifies:

"Q. What was the average distance?

A. *Average distance*, I should say about a mile and a quarter." (Rec., 4501.)

JOHN D. CLARKE testifies:

"Loblolly stood within one mile of the rivers" (Rec., 4510), thus making the *average* distance one-half mile, and

Clarke further testifies:

"loblolly stands near the rivers on low ground, while most of the brush in this vicinity stands further away from the rivers, on the higher ground." (Rec., 4510.)

Hence, because the length of haul is two and one-half times as much for the brush logs, two and one-half loads of one saw log can be hauled by one team, while a similar team hauls one load of 15 brush logs.

Dividing 15 by $2\frac{1}{2}$, we find that it costs the same to haul to the water one saw log, as it does to haul 6 brush logs, each 15 feet long.

The saw log is 50 feet long, and 6 of the 15-foot brush logs are 90 feet long.

The evidence shows that saw logs, 50 feet long, are more or less crooked, so that when laid side by side, such logs (one foot in average diameter) will take up more space than a foot in width. On the other hand, brush logs (which are 9 inches

where tied) will shrink to some extent, between the time they are made and the time they are manufactured into mattresses, so they will pack very close together.

The evidence shows that, from these two causes, and also because the saw logs averaged over 12 inches in diameter, it takes twice as many lineal feet of 9-inch brush logs to make a square yard of brush-log mattress, as it does of saw logs to make a square yard of saw-log mattress. (See also under "A" herein.)

Hence, it takes 100 lineal feet of brush logs to make a certain number of square yards of brush-logs mattress; whereas, it takes only 50 lineal feet of saw logs to make the same number of square yards of saw-log mattress.

As we have seen that it costs as much to haul 90 lineal feet of brush logs as it does to haul 50 lineal feet of saw logs, it is evident that the cost of hauling 100 lineal feet of brush logs is greater than the cost of hauling 50 lineal feet of saw logs, although each would only make the same number of square yards of mattress.

The cost, therefore, of hauling enough brush logs to make a square yard of brush-log mattress is greater than the cost of hauling enough saw logs to make a square yard of saw-log mattress. (Rec., 8096-97.)

E.

One man can unload the saw log, by simply loosening the chains, while two men are required to lift the brush logs out of the wagon racks; moreover, it takes longer to unload the 15 brush logs, than to unload the 1 saw log.

THOMAS R. LYON testifies:

"Q. Now when you come to the unloading which would cost the most?

A. The brush logs would cost the most. There is nothing for unloading the others, they are just dropped to the ground." (Rec., 5337.)

The cost of unloading the brush logs, is therefore, the greater. (Rec., 8098.)

F.

Saw logs can be put into a river, so as to float them where they are needed, without any dock or other structure, because they are hauled to the bank and then are rolled over, one by

one, into the water. This can be done at any point where there is enough water to float logs. (Rec., 8098.)

But brush logs cannot be floated successfully, hence they must be put on barges, and those barges cannot be handled in many places where logs will float. Besides that, t' brush logs must be carried by two or three men onto the barges; hence docks (or landing places) must be built, to enable the men to get from the shore to the barges, while carrying those brush logs. (Rec., 8098.)

The loading of brush logs onto the barges (under such circumstances) costs several times as much as the mere rolling of the saw logs into the water. (Rec., 8098-99.)

G.

We have now taken, step by step, the cost of the brush log, as compared with the cost of the saw log, both of them delivered in or on the water, ready to take to Savannah, and we find that at every step the brush log costs the more. We will next consider the pine poles (which bind a saw-log mattress), and compare their cost with that of the pine poles (which bind a brush-log mattress).

The saw-log mattresses were fastened together with 6-inch pine poles, called binders, and those binders were placed 8 feet apart, and spiked to the top of the logs. It took 7 of such binders (100 feet long) to thus fasten the saw-log mattress, which was 100 feet long and 50 feet wide; hence, it took 700 lineal feet of such 6-inch poles to bind a saw-log mattress. (Rec., 8099.)

The brush-log mattresses were fastened together with 4-inch pine poles, called grillage poles, which were placed 6 feet apart, so that it took 9 rows of poles 100 feet long, *i. e.*, 900 feet of such poles to bind a brush-log mattress. It took only one layer of poles (*i. e.*, 700 feet of poles), to bind the saw-log mattress, as the poles were placed only on top of the logs, and spiked to them. (Ex. 78.) But it took 4 layers of poles, each layer containing 900 feet (*i. e.*, 3,600 lineal feet of poles), to bind the single brush-log mattress, as there were two layers of poles above the brush logs (one layer running lengthwise and one layer running crosswise), and there were also two layers of poles under the brush logs (one layer running crosswise and the other running lengthwise) (Ex. 78). (Rec., 8099.)

Hence, it took 700 lineal feet of 6-inch poles to bind the

saw-log mattress and 3,600 lineal feet of 4-inch poles to bind the single brush-log mattress.

To build 8 single saw-log mattresses, would take 8 times 700 feet of binder poles. To build 8 single brush-log mattresses, would take 8 times 3,600 feet of binder poles.

But in building 8 single brush-log mattresses, one on top of the other (each of which would have four layers of binder poles, each layer requiring 900 feet of poles), it was found necessary to omit part of the binder poles, because if 4 layers of binder poles came together (as they would), it would produce a lattice work, through which the water would run and undermine the structure. (Ref. 13.)

Only 17 layers of binder poles were used in constructing an 8-course brush-log mattress. Each of the 17 layers consisted of 900 lineal feet of poles, making a total of 15,300 feet of 4-inch binder poles used in constructing an 8-course brush-log mattress, as actually built and put in the work. (Rec., 8099-8100.)

It takes one layer of binder poles (each containing 700 lineal feet of poles) for each saw-log mattress. It would therefore take 8 times as much (*i. e.*, 5,600 lineal feet of 6-inch binder poles) for 8 saw-log mattresses.

It, therefore, took 15,300 lineal feet of 4 inch binder poles for an 8-course brush-log mattress. And it took 5,600 lineal feet of 6-inch binder poles for 8 saw-log mattresses. As poles six inches in diameter contain 2¼ times as much area as poles 4 inches in diameter, the 15,300 lineal feet of 4-inch poles would be equivalent to 6,800 lineal feet of 6-inch poles.

It, therefore, required 5,600 lineal feet of 6-inch pine poles for 8 saw-log mattresses, and the equivalent of 6,800 lineal feet of 6-inch pine poles to construct the 8-course brush-log mattress actually put into the work.

It appears, therefore, that the binder poles in a 9-course brush-log mattress (actually put into the work), contained 21 per cent. more material, of the same kind, than was contained in the binder poles in 8 saw-log mattresses.

Hence, the cost of the binder poles for an 8-course brush-log mattress was 21 per cent. more than for 8 saw-log mattresses. The cutting of the poles would be 21 per cent. extra (as it cost more to cut and trim two of the 4-inch poles than to cut and trim one of the 6-inch poles). The hauling would be 21 per cent. extra, and every other expense would also be 21 per cent. extra.

In this connection, it is proper to consider the cost of the

small amount of loose brush required to be put on top of the saw-log mattresses between the 6-inch binder poles, to prevent the rock from bounding off. (Rec., 8091.)

In the first place, we have seen in "B" herein that it takes exactly three times as much labor to make brush into brush logs as it does simply to cut it for use as loose brush.

The contract required that enough loose brush should be placed on each saw log, between the 6-inch binder poles, to make a height of six inches. The evidence shows that enough loose brush can be cut from the top of the tree (from which the saw log is taken) to cover a 50-foot saw log 6 inches deep with loose brush. (Rec., 8100.)

All that was necessary, therefore, was to cut off the brush from the top of each tree, and put in on the wagon which carried the 50-foot log, and then throw it on top of the logs, when they were put in the water, and made into rafts ready to float to Savannah.

If there was any trifling extra expense in this connection, it was more than offset by the fact that it took 21 per cent. more volume of binder poles for the 8-course brush-log mattress, as actually built, than it would have taken for 8 saw-log mattresses, as required by the contract.

If that is not sufficient to offset it, it would be more than offset by the fact that if the man, who cut the 50-foot saw logs out of the trees, should spend half his time cutting the tops of the trees into brush, he would still cut per day twice as many lineal feet of saw log, as he could make of brush log, in the same day's work. (Rec., 8098-8101.)

H.

The next question for consideration is the relative cost of putting saw-log mattresses together by assembling saw logs side by side, and placing one layer of binder poles 8 feet apart on top thereof, and spiking those poles fast to the logs, and putting on some loose brush,—thus making 8 of such saw-log rafts; as compared with the cost of manufacturing a 200-ton, 8-course multiple brush-log mattress.

The making of 8 single saw-log mattresses is so simple that merely stating it again is a sufficient description; *i. e.*, the saw logs, being in the water, are put together side by side until 65 of those logs, 50 feet long, are laid side by side, making a raft 50 feet wide and 100 feet long. It takes only 65 saw logs, because saw logs are crooked, and will not lie

close together, and have more or less knots on them, which prevent their lying close together. Besides that, saw logs of the exact size of 12 inches in diameter, cannot be obtained, and in order to get logs of an *average* diameter of 12 inches, it is necessary to get more or less logs considerably larger; hence, experience shows (and the evidence also shows) that 65 of those 50-foot logs, laid side by side, will produce a saw-log mattress 50 feet by 100 feet in size. These 65 logs being laid side by side, the 6-inch binder poles are placed on top thereof, 8 feet apart, and the two outside binder poles are spiked to each log. The 5 rows of inside binder poles are spiked only every 5 or 6 logs, due to the fact that it is impossible to spike every log, as the irregularity of the logs and binder poles is such that if they are rigidly spiked to the outside binders, the inside binders will strike only here and there; and it is also due to the further fact that it is not necessary, in order to hold such a raft together, to spike more of the inside binders than one in six. This is all that it is necessary to do to construct the saw log rafts, except to throw loose brush on those rafts, which may come off the tops of trees from which the logs were cut. Then the rafts are ready to tow or float to Savannah. (Rec., 8101.)

But the manufacture of a 200-ton 8-course brush-log mattress, 100 feet long, 50 feet wide and 12 feet high, is a stupendous undertaking. In the first place, a barge must be built which will permit the 200-ton mattress to project over its sides, otherwise it is impossible to get the 200-ton mattress off the barge into the water. A frame is therefore made for the foundation of the 200-ton brush-log mattress, which frame must set up above the top of the barge a sufficient distance so that when the mattress arrives at its destination, blocks under one side of the frame may be knocked out, and thus permit the mattress to slip off the barge into the water, so as to be placed in the work. (Rec., 8102-03.)

The first thing to do is for men to carry 4-inch pine poles by hand from the shore to the barge, and place a layer thereof 6 feet apart, on the frame which is to hold the two hundred-ton brush mattress.

Then, as the poles are only from 18 to 25 feet in length, they must be lapped, and then wired twice at each lap, so as to produce poles 100 feet long, to go the entire length of the mattress.

Then, another layer of poles must be carried by hand from the shore, and placed 6 feet apart, crosswise of the first layer

of poles, and also lapped and wired. Then the two layers of poles must be wired together wherever they cross. Then brush logs must be carried from the shore by hand onto the barge, and laid side by side on those poles, and pressed up tight together, so they will stand up at least 9 inches in height, under the tremendous pressure which exists in such mattresses. Then a layer of poles must be carried by hand, and placed 6 feet apart on top of this layer of brush logs, and lapped and wired, and then this last layer of poles must be wired through the brush logs to the first two layers of poles. This very slow and very expensive work must be repeated time and again, until there are 17 layers of poles and 8 layers of brush logs.

As the mattress increases in height, the carrying of the poles and brush logs by hand increases in difficulty and in cost. When the 8 layers of brush logs and the 17 layers of binder poles are finally put in place, then the brush-log mattress, which is more than 12 feet high, must be wired from top to bottom, not only on the outside but, if possible, through the inside. This wiring through the inside is done by what is called a "needle," which is a piece of steel, as long as 15 feet, and consists in taking the wire and fastening it so that the 200-ton mattress will not only hold together while it is on the barge, but will hold together when it is unloaded from the barge into the water, where the waves are often rolling very high.

Not only must all of the poles and all of the brush logs be carried from the shore by hand, and placed carefully in this tremendous structure, but some idea of the amount of work necessary to build that structure can be obtained by considering the fact that it takes 1,480 pounds of wire (*i. e.*, over 23,000 feet of wire) to fasten the structure together at its various points. To use up 23,000 feet of wire by hand, in tying together the various parts of that tremendous structure, and then tying the whole thing together (not only on the outside, but through the inside) by needles, etc., will give some idea of the immense amount of work necessary to construct such a complicated and immense structure as a 200-ton brush-log mattress, 100 feet long, 50 feet wide and more than 12 feet high. (Rec., 8112-15.)

The cost of manufacture of an 8-course brush-log mattress is, hence, greater than the cost of manufacture of 8 single saw-log mattresses of the same size.

I.

We will next consider whether it costs more to tow 8 saw-log mattresses, or to tow the big barge with the 200-ton brush-log mattress on top of it, to the work at Savannah.

The evidence is overwhelming that it costs much more to tow the barge, with the brush-log mattress on it, than it does to tow 8 saw-log rafts. This is due to various causes, among which is the fact that the logs catch no wind, while the big barge (with a mattress over 12 feet high perched up on blocks several feet above the top) presents a length of 100 feet and a height of nearly 20 feet, which catches the wind and renders the flat bottom barge entirely unmanageable, whenever there is any considerable wind, which often happens on the South Atlantic coast. Moreover, the barge must be towed back again, and if against a head wind, or up stream, this is a very considerable item.

Captain Thomas H. Laird, who towed many of the mattresses, testifies:

"A. * * * In towing logs, there is no risk at all to the boat. * * * I have seen a tow of brush mattresses hung up high and dry time and time again." (Rec., 4494.)

"Q. What size tugs were used to tow one of these big mats, and what size for ordinary tow of 300,000 feet (B. M.) of logs? (Eight log mats equal 220,000 ft. B. M.)

A. The same tugs did the work; Ripple, Harold, Sophie." (Rec., 4495.)

Captain Charles Sweeney, who towed most of those mattresses, testifies that he had:

"A. * * * More trouble with barge mats than log mats.

Q. Go on and state in regard to towing log mats, how you got along with that, and then state in regard to towing brush mats?

A. We would go up to the camp and take what was there and come down in one tide (log mats), but the others (brush mats) we have gone a night and day.

Q. Did you have any difficulty in handling one more than the other?

A. Yes, sir, the log mats would hold no wind because they are even with the water." (Rec., 4498-99.)

The witnesses all testify it is much more expensive to tow

the big brush-log mattress than to tow 8 single saw-log mattresses. (Rec., 8106.)

J.

The last thing to consider is the cost of sinking 8 single saw-log mattresses, compared with the cost of sinking one 200-ton 8-course brush-log mattress. On this question, the witnesses all testify one way, *i. e.*, the expense of sinking one 8-course brush-log mattress is very much greater than the cost of sinking 8 single saw-log mattresses, due principally to the fact that it is a matter of immense difficulty to get one of those 200-ton mattresses off the barge into the water at the right place, especially when he winds are blowing and the waves are rolling, as is often the case on the South Atlantic coast. All kinds of experiments were made before any scheme could be devised by which that big 200-ton brush-log mattress could be got off the barge at all. Finally it was found that it could be done by putting it up on blocks above the barge, and arranging the blocks so they could be knocked out from under one side of the mattress, and in this way the launching of the big mattress could be done with a considerable degree of success. (Rec., 3597-99.)

Captain Thomas H. Laird testifies:

"Q. Do you know anything about the sinking of multiple mats?

A. I have sunk them right at the spot.

Q. Which takes the most time to sink them, the big multiple mat on barges, or log mats equivalent to say 300,000 feet, or 8 log mats 50 by 100 feet, assuming you have them both near where you want to sink them?

A. The log mats are easiest to sink.

Q. Now as to the time in sinking them; which takes the longest, the big mat, to get it off the barge, get it in place, and get it down; or 8 log mats, 50 by 100 feet, and sink them?

A. There is no interruption in tide with log mats; I have seen boats drifting with brush mats and lose them.

Q. You are speaking of the sinking of log mats prior to 1893 compared with the multiple mats since?

A. Yes, sir; * * * I could sink log mats as fast as they could build them; they are the easiest thing in the world to get rid of." (Rec., 4494-95.)

CAPTAIN CHARLES SWEENEY testifies:

"Q. Are you familiar with the sinking of log mats, and also multiple brush mats?

A. I helped sink both.

Q. Tell us about sinking these?

A. To sink log mats we had two barges and put mats between them; we generally sink them on slack water, high or low; we piled on stone enough to sink the end, and slack the line and let it go down; we have sunk as high as 500 in two hours.

Q. Log mats?

A. Yes, sir.

Q. With regard to brush mats, as to the sinking of that?

A. We have had a great deal of trouble with brush mats, and at Cockspur training wall, we have over three days trying to sink piles, had to get a pile driver to do it; we would take a tug and run into it to get it off." (Rec., 4499.)

"Q. Which would take the longest time to sink; 8 log mats 50 by 100 feet, or one of these multiple mats?

A. We have been 6 hours trying to sink a multiple mat; log mats don't trouble us as much as the brush." (Rec., 4499-4500.)

MAJOR F. V. ABBOT, Corps of Engineers, testifies concerning the sinking of mattresses in multiple:

"The attempt was made to do the same thing at Charleston once; but it failed." (Rec., 814.)

MAJOR C. McD. TOWNSEND, Corps of Engineers, testifies:

"A. * * * That would be a very difficult problem on an ordinary mat barge, to build an 8-course mattress and sink it."

The Witness: "Until I saw this patented arrangement here I should have considered it rather impracticable.

Q. What patented arrangement do you refer to, the gin boat?

A. Yes, sir." (Rec., 2982-83.) See also (Rec., 8108).

Both the saw-log and the brush-log mattresses were sunk by placing enough stone on them to sink them. This stone was furnished by the contractors, and was paid for at $2.95 per ton, whether the mattresses sunk were saw-log mattresses or brush-log mattresses. (Ex. 78.)

K.

This completes a comparison of every step in the cost of saw-log and of a brush-log mattress, and shows conclusively that the cost of the brush-log mattress was the greater. This shows conclusively that Greene and Gaynor never paid either Westcott or Carter any money in consideration of Carter calling for brush-log mattresses, which were more expensive than saw-log mattresses.

The brush mattresses, which Carter used, *were also very much better for the work than the log mattresses,* as will be seen from the following:

"Mr. Stone: I offer in evidence the following extract from the annual report of the Chief of Engineers for 1887, page 1210, which reads as follows:

'The log mattress was not sufficiently flexible to follow closely the irregularities of the sand, and great holes were eroded under the structure from side to side. * * * When less than 100 feet wide, the water finds little difficulty in passing under it, and by eroding the sand, in lowering it in one instance as much as 20 feet. * * * accordingly authority was obtained to make a mattress of two layers of brush fascines compressed between grillages of poles, in the general manner suggested by Mr. R. G. Ross of Wilmington, North Carolina. *Two of these were made and placed on the work. They proved exceedingly strong, flexible and elastic. Their only defects were in their weight and in their greater cost as compared with the log mattresses.* The greater weight makes it necessary to build them on shore to launch them, but a short time before they are placed. * * * A new mattress has been proposed which is expected to be lighter and cheaper, while nearly as strong and quite as flexible, as those already tried.'

Q. (Mr. Erwin.) I will ask Captain Carter a question about that: Captain Carter, that is an extract from what?

A. From the report of Captain Black to the Chief of Engineers, concerning the first brush mattresses used on the South Atlantic coast.

Q. You quoted that from the report of the Chief of Engineers for 1887?

A. That is true, the report of Captain Black. From

experiments made at Mayport, Florida, which is at the mouth of the St. Johns River. These mattresses then being experimental mattresses and very expensive, were modified the next year and specifications were prepared for a mattress which is practically identical with what is known as my second design; and concerning that mattress Captain Black reported further in 1888, in his annual report to the Chief of Engineers, on page 1083:

> 'As stated in the last report, the log mattress used in the jetties has not been satisfactory. It is stiff and permits the water to pass between the logs composing it, thus producing underscour and settlement. Accordingly, authority was obtained to make a mattress of two layers of brush fascines compressed between grillages of poles, in the general manner suggested by Mr. R. G. Ross, of Wilmington, N. C. Two of these were made and placed on the work. They proved exceedingly strong, flexible and elastic.'" (Rec., 8789-91.)

Brush mattresses were so much more valuable to the Government than log mattresses, that although Captain W. M. Black, Corps of Engineers, was paying only 45c per *square yard* for log mattresses (12-inch logs covered with 5 inches of brush), he abandoned their use and bought brush fascine mattresses (9-inch fascines) at 74c per *square yard*. (C. M. Def. Ex. 24, p. 11.)

Brush Mattresses Better Than Log Mattresses.

Where the bottom is very soft, where there are any irregularities, or where there is any water pressure or wave action against a jetty, log mattresses (and mattresses of military fascines which act in the same way) are entirely unsuitable, and flexible brush mattresses must be used, the object being to gather silt and sand, thus forming a mound which will cover and protect the mattress. (Rec., 7999; 833-34.) (See also References to the Evidence, page 121.)

G. Y. Wisner, director of the American Society of Civil Engineers, who built the great Eads jetties at the mouth of the Mississippi river, and who was a member of the United States Deep Waterway Commission, testifies:

> "Q. I will ask you if there is any advantage in the *brush mat* over the *log* (or military fascine) *mat*, so-called, because of flexibility?
>
> A. Yes, sir.

Q. And why?

A. The log mattress, in being placed in position on a bar composed of hard sand, will not conform closely to the bottom, giving opportunities to currents, due to wave action, to cause scouring. The brush mattress, being pliable, fits the bottom very closely, and that trouble is generally avoided, provided always that the mattress is of sufficient thickness that the action of the wave is not through it.

Q. Having in view the work to be accomplished here at Cumberland Sound and at Tybee Breakwater, would a thin mattress of brush be as valuable as a thicker one?

A. I know of no reason why a thin mattress should be used at all; it is useless." (Rec., 2614.)

(This disposes of Mr. Erwin's claim that a single thin mattress is better than Carter's thick multiple mattress.)

WISNER further testifies that *a mattress of military fascines acts in identically the same manner as a log mattress* (Rec., 2614), and when asked whether the great work done by Carter at Savannah could have been done successfully with mattresses of military fascines, answered:

"A. That is rather a difficult question to say. I have doubts myself whether it could or not; but I am quite certain, admitting that it could have been carried out, *it would have cost at least a million dollars more than it did.*"

Q. That the use of such mattresses (military fascine ones) as that on the barge across the river would have cost the government at least a million dollars more than the work has done?

A. Certainly; a mattress of that kind, putting in individual mattresses, requires stone for each mattress in sinking; in doing that you would have added to the cost per lineal foot a very heavy percentage; the additional weight would have caused settlement in the soft bottom in all probability, and the character of the mat itself (military-fascine mat) is not adapted for catching silt. *The work which has been put in,—that is the multiple mattress,—is well adapted for that purpose.*" (Rec., 2627.)

A. E. KASTL, member of the American Society of Civil Engineers, who built the jetties at the port of Tampico, Mexico, testifies that an open-work mattress, such as a log mattress or

a military-fascine mattress, is unsuitable, and that flexible brush is needed, saying:

"A. If the water cannot flow freely through the jetty, the tendency is for the jetty to silt up with the sediment, and the sand in the water to be deposited in the jetty, in the mattress." (Rec., 2822.)

"Q. If the mattress were pervious, and permitted the free flow of water through, what effect would that have upon the foundation, or the sand underneath the mattress?

A. The foundation would be very apt to be scoured out; in fact it would be scoured out." (Rec., 2822.)

General Q. A. Gillmore, United States engineers, in speaking of the log mattresses used at Savannah, says:

"The damage to the upper courses of some of the dams, caused by the cyclone of August, 1885, had left their crests so irregular and uneven as to render it impracticable to repair and raise them with the somewhat *rigid log mattress* provided for in the specifications; and by authority of the secretary of war, a supplemental contract was entered into with Mr. Gaynor, requiring brush-wood fascines." (C. M. Def. Ex. 24, p. 50.)

E. A. Gieseler, a witness for the complainant, testifies of the Savannah work as follows:

"A. I don't believe in Captain Gillette's fascine for work of this kind, and I have told him so. I believe that fascine is the best which has the greatest number of fine twigs or branches in it. * * * The office of the fascine is to hold the bottom; that is, hold the particles of the bottom to protect against scour. Generally this office is performed by friction between the particles of the bottom and the superficial area of the component parts of the fascine. That fascine which has the greatest superficial area will be the best to hold the particles of the bottom, on account of the friction with them. Now, if you take the two extremes; *taking a single log, 9 inches in diameter,* that would have only a small superficial area; if a fascine is composed of *sticks ¼ inch in diameter,* the sum of the superficial areas of those sticks would probably be 6 or 7 times the superficial area of the log; if you make those sticks still smaller, it would be still greater; of course there is a limit, but theoretically it would be

the case. *That is why I would prefer the brush stuff down to the practical limit.*

Q. The fascine as actually used by Captain Carter has accomplished its work?

A. Judging from experience, and what we see in Savannah Harbor, it is to be presumed that it has." (Rec., 1329.)

O. M. CARTER testified before the courtmartial with respect to the use of log mattresses by General Gillmore at the Cross Tides, which is just above Savannah, saying:

"A. * * * Every effort to do anything up there resulted in failure. Works had been constructed there nearly a hundred years ago, and those had failed; and he (Gillmore) started in with a pile closing dam, and that failed; he then started in above that with a log and brush mattress dam, in a depth—as I remember—of from 3 to 5 feet, and as a result of that (which went to pieces) we had depths—as I remember it—of over 70 feet, where we had depths of less than 7 before.

Q. That is, the mattress went down seventy feet approximately?

A. It turned over, and we had all sorts of trouble up there; and finally brush fascines were used to try to stop the flow, as being more compact than the open log mattress. * * * With brush mattresses I closed the channel back of the Marsh Island in one day, practically, by building enough mattresses to close the whole channel at once, and building them high enough to come up to low water." (Rec., 3643.)

MAJOR W. M. BLACK, United States engineers, who used the log mattress (with brush on it) of Gillmore at Mayport, Florida, in 1886, testifies as follows concerning that mattress:

"A. * * * It proved unsatisfactory. During the continuance of that contract, I first tried two or three mats in the north jetty, consisting of a log raft alone, without any brush. That was also unsatisfactory, and by authority, I obtained permission to construct a supplemental mattress of brush fascines made after the design of a contractor, Mr. R. G. Ross, and two of these were put in; so that when the contract of 1888 was let, the brush fascine mattress was the only one called for." (Rec., 692.)

MAJOR BLACK reported to the chief of engineers:

"The log mattress was not sufficiently flexible to follow closely the irregularities of the sand, and great holes were eroded under the structure from side to side. * * * When less than 100 feet wide, the water finds little difficulty in passing under it, and by eroding the sand, in lowering it in one instance as much as 20 feet. * * * Accordingly authority was obtained to make a mattress of two layers of brush fascines, compressed between grillages of poles, in the general manner suggested by Mr. R. G. Ross of Wilmington, North Carolina. Two of these were made and placed on the work. They proved exceedingly strong, flexible and elastic. Their only defects were in their weight, and in the greater cost, as compared with the log mattress." (An. Rep. C. E. 1887, p. 1210.)

"The log mattress used in the jetties has not been satisfactory. It is stiff, and permits the water to pass between the logs composing it, thus producing underscour and settlement." (An. Rep. C. E. 1888, p. 1083.)

The brush-fascine mattress contracted for by Major Black was identical with Carter's second design mattress (Rec., 693), and was identical in cost with Carter's third design mattress, which was the principal mattress used by Carter after 1891. (Rec., 694.)

Brush mattresses were so much more valuable to the government than log mattresses that Major Black, although paying only 45 *cents per square yard for log mattresses* (12-inch logs covered with 5 inches of brush) (An. Rep. C. E. 1887, p. 1215), abandoned their use and bought brush-fascine mattresses made of a single layer of 9-inch fascines, with cross-fascines at 6-foot intervals, *paying for those mattresses of 9-inch brush fascines the sum of 74 cents per square yard!* (C. M. Def. Ex. 24, p. 11.)

—17—

PRICES FOR MATTRESSES BY THE SQUARE YARD, ETC.

GENERAL W. P. CRAIGHILL, who was the Chief of Engineers, testifies in Carter's favor concerning the award of the contracts of 1896, under which mattresses were purchased at 95c per square yard at Savannah, and $1.10 per square yard at Fernandina, as follows:

"Q. Did you have any conversation with the Secretary

in regard to the approval of the 1896 contract at Fernandina and and Savannah Harbor?

A. I did.

Q. *Will you state whether or not you advised the letting of those two contracts?*

A. *I did.*

Q. *And the letting was approved by the Secretary?*

A. *Yes; and the contracts were made.*" (Rec., 3418.)

GENERAL CRAIGHILL gives further testimony in Carter's favor, showing that the question of price was specifically considered when he recommended the award of those two contracts, for he testifies:

"A. * * * The Secretary of War thought the prices were too high * * * and he asked me the question what I thought about the bids, and I said, 'Mr. Secretary, these are the lowest bids, and they are all within the estimate, as I understand it, and my *recommendation is that they be accepted,* because the work is one that should be prosecuted without delay, and it is an important work. Delay is injurious to it, and in my judgment these bids should be accepted,' and I think he finally did accept them, and the work was prosecuted." (Rec., 903-04.)

The WITNESS: "*The prices in bids are all considered before the contract is approved.*" (Rec., 12220.)

A BOARD OF ENGINEERS, consisting of six officers of the Corps of Engineers, which was convened by the Chief of Engineers at Savannah in October, 1895, for the express purpose of considering the question of cost, reported unanimously on December 18, 1895, the following estimate: "*brush mattresses at* $1.00 *per square yard.*" (C. M. Def. Ex. 23) (An. R. C. E. 1896, p. 1295.)

MAJOR W. M. BLACK, Corps of Engineers, a member of that Board, and a witness for the complainant in this case, testifies in Carter's favor concerning that cost as follows:

"Q. At the time of the adoption of that report, did you think the estimate was too high of $1 a square yard?

A. I thought they were high enough, but not too high." (Rec., 699.)

MAJOR BLACK testifies concerning similar work done at Mayport, which is at the mouth of the St. Johns River (at which

point the evidence shows work can be done at less cost than at Fernandina), as follows:

"Q. If you were receiving bids upon a piece of work like that, would you draw the line at 75 cents at which you would recommend the bid as a reasonable one, or might you put it a little higher?

A. I might put it a little higher, because I think there was a very small margin at that price. *The last contractor had it at 70 cents, and he really failed.*" (Rec., 698.)

MAJOR BLACK testifies concerning the character of the work required under the contract:

"The work there was a little peculiar because there are a very few bidders, and I don't remember that there was much variation. It was a work that was considered dangerous to a contractor, a risky work, and we did not have, at the mouth of St. Johns River, very many bidders.

Q. One man bidding on that kind of work would want to allow more for the risk, which was an uncertain quantity?

A. That seemed to be a function of the experience of the contractor.

Q. So that in bidding on that kind of work, the price might range from 75 cents to $1.25 without creating any astonishment?

A. I should not have let the bid at the major price.

Q. You might have let it at a dollar?

A. I might have." (Rec., 699.)

GEORGE Y. WISNER, a promiment civil engineer of 33 years' standing, who has had much experience in the construction and use of brush fascines and mattresses in works or harbor improvement, testifies with regard to the mattress work at Savannah that:

"It could not be done for much less than probably the figure it was taken at.

Q. 95 cents?

A. 95 cents." (Rec., 2624.)

J. W. RUTHERFOORD, a prominent civil engineer and contractor of more than 28 years' standing, who had been connected with some 35 public works in the United States, who had used "a good many thousand cords of brush," and who visited the Cumberland Sound work (with the view of sub-

mitting a bid therefor), testifies he had prepared his bid for the work:

"Q. Have you any objection to telling us what price you proposed to bid for mattresses?

A. None whatever; $1.05 *was to be my bid.*

Q. Was that a reasonable, fair price, considering the cost, and a fair profit to the contractor?

A. That I considered it." (Rec., 3160.)

Concerning his proposed bid, Mr. Rutherfoord was asked and testified:

"Q. You were not in any combination with either Greene and Gaynor, or anyone else, were you?

A. No; I am not just on terms of sufficient intimacy to go into any combination with them.

Q. You are a competitor of theirs?

A. Yes, sir." (Rec., 3159.)

W. F. McCauley, an unsuccessful bidder for the work done under the big contract, and who is now a witness for the Government, bid $1.13 *per square yard for brush mattresses.* (C. M. Def. Ex. 24.) McCauley testifies as a witness in this suit that he:

"is familiar with the work in Savannah Harbor, and in 1892 made a bid for the doing of same. * * * *The prices bid were very reasonable.*" (Rec., 1014.)

Jacob Friday, a contractor of large experience, who constructed the great jetties for the improvement of Charleston Harbor, and who was a competitor of Greene and Gaynor, testifies as follows:

"I consider the actual cost of mats, made of brush fascines, to the contractor to be about 80 to 90 cents a square yard in the work. * * * Considering the circumstances at the time of the letting, the Fernandina prices are very reasonable, and no lower bids could have been had." (Rec., 995.)

E. L. Friday, who bid $1.12 *per square yard for brush mattresses,* and who was a competitor of Greene and Gaynor, testifies:

"That he is a member of the firm of Jacob Friday & Sons, who are contractors, and who have done a lot of Government work on the Atlantic Coast, and deponent knows the difficulties and cost attending the same. Deponent went over the ground at Fernandina carefully in 1896 and got the specifications and bid on the work. * * *

In view of all the circumstances, the bids were very reasonable, and in deponent's judgment, no lower prices could have been obtained then." (Rec., 996.)

RITTENHOUSE MOORE, a prominent contractor and a competitor of Greene and Gaynor, testifies:

"That his business at present is that of a contractor. He has been engaged in such business for more than 20 years. That a portion of the contracting work done by him during that time has been upon the Gulf and South Atlantic Coast in the building of jetties for the improvement of entrances to harbors. That he has also investigated carefully the cost of building such jetties in order to enable him to make bids for other work of the same character. That the construction of such jetties involved the building and use of brush mats. That he is thoroughly familiar and knows the cost of building such brush mats for the purpose of building jetties. That he has seen and is familiar with the location of the work on Savannah River and Harbor. That he is also familiar with the location of the work at Cumberland Sound. Deponent further says that from his experience and in his judgment, the cost of any kind of mats in the work in either of those locations, would be at least 60 cents per square yard, and that such cost would be liable to be considerably increased owing to the condition of the weather, and difficulty in obtaining the material; such increase might be from 25 to 30%." (Rec., 1015.)

R. A. BLANDFORD, a consulting civil engineer, testifies that the average cost of the work done by Captain Carter was cheaper than the average cost of similar work done at 21 other points on the Atlantic and Gulf Coasts of the United States. (Rec., 3010.)

A. R. STEWART, a competitor of Greene and Gaynor, testifies:

"Q. What would you consider from your experience in mattress work, would be a fair price to a contractor for the mattress work at Cumberland Sound?

A. I think about the figure that we estimated would have been about right. I think the amount as bid was about a dollar.

Q. A square yard?

A. Yes, sir." (Rec., 651.)

Major Thomas H. Rees, Corps of Engineers, then Assistant Professor of Engineering at West Point (who had been on duty at Savannah from the fall of 1889 to the spring of 1893, and who saw the very mattresses in question being placed in the work), testifies in Carter's favor:

"Q. Have you made a sufficient study of the fascine and mattress construction during your tour of duty here to give any estimate of the cost per square yard of such mats as you actually saw constructed and put into the work?

A. I have estimated on the cost of that kind of work, —mattress construction in the work of this character.

Q. In your opinion, what would be the actual cost of such mattresses as you actually saw constructed and go into the work in this district per square yard, one mattress thick?

A. In the works, somewhere between 60 and 80 cents, —60 cents perhaps if everything was favorable; 80 cents if conditions were not so favorable; for longer hauls, bad weather, scarcity of material, etc.

Q. And with respect to the two localities, Savannah Harbor and Cumberland Sound; which place would it be more expensive to build such mattresses?

A. It would be more expensive at Cumberland Sound, considerably so." (Rec., 2849.)

With regard to his estimate, Major Rees was asked and testified:

"Q. Does it include profit to the contractor?"

A. It does not." (Rec., 2850.)

George W. Brown, a civil engineer, employed by the Nicarauga Canal Commission (who had been employed for some six years in the Savannah District and who was familiar with the very work in question), testifies in Carter's favor:

"Q. Are you sufficiently familiar with the exposure at Cumberland Sound, and the cost of the mattress work in the Savannah District, to express an opinion as to whether the price of $1.10 per square yard is excessive?

A. I don't think it ought to be considered excessive." (Rec., 851.)

The Witness: "I made an estimate as to the cost of the work, and as I remember it now, it was 80 to 85 cents per square yard.

Q. As actually constructed?

A. As constructed and put in the work.

Q. Suppose you were a contractor; knowing the conditions and exposure at Cumberland Sound, what do you think would be a fair increase over that actual cost to include in the contractor's profits?

A. In my opinion at least 25 per cent. on all contract work should be allowed for over the greatest probable cost. This place being more exposed, I would say the cost was liable to be more." (Rec., 852.)

Roderick G. Ross, a competitor of Greene and Gaynor—(a prominent contractor who, in 1888, designed for Major Black the first brush-log mattress ever sunk at Mayport, Florida, and of whom Major Black testified that he is:

"an experienced contractor in whose opinion he would have confidence" (Rec., 701),

and who was familiar with the work actually done at Savannah and at Fernandina),—testifies in Carter's favor:

"That he has been a contractor for over 20 years. That during that period he has been extensively engaged in constructing and superintending the construction of brush fascines and mattresses at various places on the South Atlantic coast under contract with the United States Government. That from personal inspection and examination he is thoroughly familiar with the locality and all the conditions existing in relation to the Government work at Cumberland Sound. * * * That deponent knows that the construction of the fascines at Cumberland Sound under the contract of 1894 were properly built, and like those built by deponent under his contract at Mayport. * * * In deponent's judgment it cost the contractor 10 to 20% more for mattresses at Cumberland Sound than at Mayport, on account of exposure and strong currents, and *work as finally let at Cumberland Sound are in deponent's judgment reasonable and fair.*" (Rec., 1018-19.)

Ross testifies further:

"I have done work at Fernandina and Mayport, and *the actual cost to a contractor of mats made by your specifications was about 60 cents a square yard at the building place, or about 90 cents in the work, if sunk in layers as the contractors did the work at Fernandina.*" (Def. Ex. 122.)

I. H. HATHAWAY, a prominent contractor, and a competitor of Greene and Gaynor, testifies in Carter's favor:

"That he is a contractor and has had a long experience building jetties on the Atlantic coast. That he has built brush fascines and mats, and knows what they cost. Deponent is familiar with the kind of mats at Mayport and at Fernandina, and had the contract at Mayport from 1892 to 1895. The fascines and mats built at Fernandina are just like those built at Mayport. * * * The same kind of jetty work at Fernandina will cost more than at Mayport by about 30%. Deponent knows the present prices at Fernandina, and knows the kind of work done. *The prices are reasonable.*" (Rec., 1009.)

JAMES A. BRYAN, a well-known contractor, and a competitor of Greene and Gaynor, testifies in Carter's favor:

"That he is an experienced contractor and knows the difficulties attending jetty work and the cost thereof. Deponent has made and seen made log mats, brush fascines, and brush mats, at various places on the South Atlantic coast. He is familiar with the mat work done at Mayport and at Fernandina, and with the specifications for them. * * * Jetty work at Fernandina costs about one-fourth more than at Mayport. *The present prices at Fernandina are reasonable.*" (Rec., 1034.)

J. B. SANFORD, a well-known and experienced contractor, and a competitor of Greene and Gaynor, testifies in Carter's favor:

"That he is an experienced contractor, and that he is familiar with the character of the mats used in the Government works along the South Atlantic coast; that he knows the difficulties and cost attending the construction and sinking of the same; * * * that he knows the prices paid at Savannah and Fernandina, and the kind of mats used, and *the work could not have been done for less money.*" (Rec., 1020.)

JOHN L. GRIM, a well-known contractor, and a competitor of Greene and Gaynor, who in 1896 bid for mattresses 98 *cents a square yard at Savannah and* $1.15 *a square yard at Cumberland Sound*, testifies in Carter's favor:

"That he is a practical and experienced contractor; that in 1896 he bid on the Savannah and Fernandina work; that deponent has had very extensive experience

in work of that kind and knows what things cost; *that mats, built like they have been built at Savannah and Fernandina, of brush fascines in layers of mats on top of one another, will cost a contractor between* 80 *and* 95 *cents per yard in the work,* depending upon the locality and other causes; * * * Deponent bid on both works in 1896, and the prices in his bid are low, considering the times and circumstances. No lower bids could be had at that time so far as deponent knows. *Deponent knows the sort of fascines and mats used in the Savannah and Fernandina work, and in deponent's judgment, they are as good as used anywhere else, and better than most.*" (Rec., 1008.)

THOMAS J. DANIELS, the Government inspector, who inspected many of the mattresses actually used at Savannah, testifies in Carter's favor:

"That he is at present inspector on the Government works in Savannah Harbor; that he has been employed as such for some years, and that he is familiar with the coast country of Georgia, and with the methods of making brush fascines and mattresses, and with the specifications under which such have been made at Savannah and Fernandina since 1892. Deponent knows the cost of constructing and sinking mattresses, and states that to the best of his knowledge and belief mattresses in several courses on top of one another, as at Savannah and Fernandina, cannot be put into the work for less than 75 *to* 85 *cents per square yard.*" (Rec., 995.)

It is thus seen that the prices paid for mattresses were reasonable.

COLONEL S. M. MANSFIELD, a member of the court martial, *paid* $9.50 *a cubic yard for brush in mattress form, which is more than five times as much as Carter paid.* (Rec., 8115-16.)

MAJOR W. S. STANTON, another member of the court martial, *paid* $1.05 *per square yard for brush mattresses* at Winyaw Bay, S. C., in 1892, which is about 10 per cent. more than Carter paid at the same time and in the same vicinity for similar mattresses under the big contract. (Rec., 8028.)

For further details, see (Rec., 8021-23; 8028-29, 8115-16; 8248-54; 8277-81; 8388; 8408.)

To meet the overwhelming evidence that reasonable prices

were paid for the mattress work actually done, the complainant introduces the testimony of Gillette, and of his four employes, Cooper, Twiggs, Keating and Hale.

Not one of those witnesses pretends ever to have employed labor and built any mattresses!

An allegation, which had not been manufactured at the time of the court martial, and which is now urged by the complainant, is that Captain Carter invented the method of purchasing mattresses by the *square yard*, instead of purchasing them by the *cubic yard*, as it is alleged they had formerly been purchased. It is charged that this alleged change increased the price of mattresses by 300 per cent. (Bill of Complaint, p. 19.) There is only one witness in support of that proposition, and that is the witness Gillette.

That Carter was ordered by the Chief of Engineers to buy brush mattresses by the *square yard* is shown by the contract. (Ex. 78; Sec. 44.)

The method by which the complainant works out the alleged former purchase of mattresses by the cubic yard for use in harbor work, is, in brief, as follows: Where fascines were bought (in some supplemental contracts), the contractors were required, in a few instances, to bundle some of those fascines into so-called mattress form, and to sink them in this way without any extra cost to the Government, because their quantity was so small. The total quantity thus sunk in bundle or mattress form was less than 2½ per cent. of the total quantity purchased. (See Rec., 8124.) That requirement is now tortured into meaning that fascine mattresses were formerly purchased by the cubic yard.

For example: In 1889, a contract was let for brush fascines to be used in Brunswick Harbor, in making repairs to the old training wall, which had settled in places. (Ex. 88.)

The price paid for those brush fascines was $1.34 per cubic yard; and inasmuch as it was thought there might be a few places where the brush would have to be bundled into mattress form (so as to hold it in the deep places while it was being loaded with stone), the contractor was required to do the small amount of such extra work (should it be found necessary) without cost to the United States. (Ex. 88; § 3 of Specifications.)

It was not found necessary to bundle any of the fascines into mattress form under that contract (An. Rep. C. E. 1889, pp. 1265, 1268), and they were sunk simply as fascines.

Notwithstanding those uncontradicted facts, the complain-

ant now asserts the Brunswick contract of 1889 was a purchase of brush *mattresses*, and that they were bought at a cost of only $1.34 per *cubic* yard; when, as a matter of fact, not one single mattress was purchased or used under that contract at all!

Again: In 1890, a contract was let for brush fascines to be used in Savannah Harbor. (Ex. 77.)

The price paid for those fascines was $1.40 per cubic yard, and they were to be used as filling for pile training walls (or dams); in places where scour might develop, it was thought a few of them might have to be bundled into mattress form, so the contractor was required to do such work (should any be found necessary) at no extra cost to the United States, the quantity being so insignificant. (Ex. 77; § 4 of Specifications.)

Under that contract about 50,000 cubic yards of fascines were used, of which about 1,250 cubic yards were lashed to scantlings and sunk alongside of a dam about 500 feet in length, which was built at a place called "Duck Puddle." (Rec., 10782.) The total amount of fascines used at Duck Puddle was about 6,500 cubic yards, of which 5,250 cubic yards were thrown in loose between the piles of the dam, while 1,250 cubic yards were lashed to scantlings and sunk in raft fashion as explained. *No other fascines were sunk in bundle or raft form during that contract.* (An. Rep. C. E. 1891.)

Notwithstanding those uncontradicted facts the complainant now asserts the Savannah contract of 1890 was a purchase of brush *mattresses*, and that they were bought at a cost of only $1.40 per *cubic yard;* when, as a matter of fact, not a single brush mattress was bought at any price, and only about 2¼ per cent. of the fascines purchased were even sunk in raft form!

Another misrepresentation by the complainant is as follows:

Under a supplemental contract of December 22, 1886, General Gillmore bought some fascines for use in Savannah Harbor, paying therefor $1.10 per cubic yard. (Ex. 75.)

Although Gillmore bought no brush mattresses at any price, and required only about 1,000 cubic yards out of the 40,000 cubic yards of fascines purchased under that contract even to be made into bundled form (Rec., 8123-24), nevertheless the complainant now asserts that contract was a purchase of brush *mattresses*, and that they were bought at a cost of only $1.10 per *cubic yard.*

The complainant then takes the diameter of the fascines at the lashing points, which is 9 inches, and says that it would take 4 of such fascines to make 36 inches, regardless of the fact that a 9-inch fascine, at the lashing points, has an average diameter of about 12 inches. As 36 inches make a yard, the complainant says that each cubic yard of fascines would make 4 square yards of mattress, and that hence, Gillmore paid only "27½ cents per square yard" for brush mattresses! (Rec., 10.)

As matter of fact, as will be seen herein later, it took only 10 fascines, piled up loose like cord-wood as they were for measurement, to make a cubic yard; and it took 6 of those same fascines to make a square yard of mattress, such as Carter used; hence, at Gillmore's prices of $1.10 per cubic yard for the loose fascines, the cost of the fascines alone in a square yard of mattress was 66 cents. As it cost 23 cents per square yard to manufacture those fascines into mattress form, Gillmore really paid at the rate of 89 cents per square yard for brush mattresses, and *not* 22½ cents, as the complainant now contends he did!

The evidence shows that mattresses were bought by the *square yard* by other engineer officers, long before Carter ever bought any in that way, and shows not only that fascine mattresses had always been purchased on the Atlantic coast by the *square yard,* but that the Government paid much less for mattresses purchased in that manner, than it would have paid, had the fascines been bought by the cubic yard, and then manufactured into mattresses, as the complainant now contends ought to have been done.

Colonel W. H. Bixby, Corps of Engineers, testifies in Carter's favor:

"Q. (Mr. Stone.) Col. Bixby, you have had some experience on the South Atlantic coast?

A. I have.

Q. You made some contracts down on that coast for the purchase of brush mattresses, did you not?

A. I did in about 1890, had two contracts.

Q. Those contracts were made some time prior to this big contract of October, 1892, were they not?

A. Yes, sir, they were made in 1890 some time; I have a note of the annual report of the Chief of Engineers. Made in about 1890, because I left there in 1891. One contract was made and the contractor failed, and the contract had to be readvertised, and the second

contract was awarded before I left; I left in 1891. One was June 24, 1889, for the advertisement, and the other was November 6, 1890.

Q. You are speaking of the contracts which you let on the South Atlantic coast?

A. Yes, that is the date of the specifications, June 24, 1889, date of the advertisement.

Q. Did you purchase brush mattresses by the *square yard* in those contracts?

A. '*Mattresses by the square yard of top surface.*'

Q. Brush mattresses?

A. Brush mattresses, both contracts per square yard of top surface.

Q. What were the prices?

A. The first contract is 57 cents per square yard of top surface.

Q. The contractor failed in that contract, didn't he?

A. He did.

Q. What was the next one?

A. 70 cents per square yard of top surface.

Q. Who was that contract let to?

A. The second one was to W. T. Gaynor." (Rec., 8491-92.)

"Q. Referring back again to those contracts which you let for brush fascines by the square yard. *Suggestion seems to be made in this case that Carter invented the scheme of buying mattresses by the square yard, and he did so in order to defraud the Government. Do you understand he was the first one to use mattresses by the square yard?*

A. My impression is that myself and Captain Black did it long before he did. These specifications of mine of 1889 and 1890 were following a general type of fascine mattresses that had been used on the St. Johns River under Captain Black, and I put the item in, I do not know now whether I got the idea of buying by the square yard from Captain Black or not, I have never looked that up since, but *it was natural for me to buy them by the square yard as the most feasible method of measurement and payment.*

Q. Is not a mattress purchased by the square yard, with two rows of grillage poles at the bottom and two rows of grillage poles on top, built according to that contract, an entirely different affair from purchasing fascines by the cubic yard?

A. Why, yes. *Buying brush alone, buying fascines alone, why they would be stacked up ordinarily, stacked up and measured in the same way you would measure cord wood, stacked up and measured by the cubic foot or cubic yard, but when they were put into the mattresses, there was so much work connected with building them into the mattresses that the only feasible way I saw at the time was to pay for them by the square yard, which was the reason that I put it into those specifications.*

Q. (Mr. Stone.) I now call your attention to a contract let by Major Stanton, who the testimony shows was one of the members of the court martial which tried Captain Carter.

The Witness. My specifications state that the form of mattress is generally the same, built upon the same general principles as the St. Johns mattresses which were under Captain Black.

Q. (Continuing.) This contract made by Major Stanton is dated November 8, 1892, it was advertised August 13, 1892, and appears to be at an almost identical date of the letting by Captain Carter, or through him, of the big contract at Savannah with Greene and Gaynor. I will ask you to examine this contract of Major Stanton's and ask you if he does not buy brush mattresses by the square yard, by that contract?

A. That is for mattresses at Winyaw Bay jetty, that is the same place that my contracts were for, and this contract was made by Major Stanton after I left, after he relieved me.

Q. I ask you to carefully compare the specifications for Major Stanton's purchase of brush mattresses, with the specifications under the big contract at Savannah, October, 1892, both contracts being made at about the same time, and point out what difference, if any, there is in the construction of mattresses and in the material required to construct them. I will first ask you if the price paid by Major Stanton is not $1.05 per square yard?

A. *Mattresses* $1.05 *per square yard, top surface.'*

Q. The price under the big contract at Savannah is 95 cents a square yard. * * * Captain Carter has figured out in detail on the witness stand here that the amount of grillage poles in the Stanton mattress, according to the volume, was about one-half of the grillage poles in his mattress, in view of the fact that the poles in the Stanton mattresses were of smaller diameter than

the poles in his mattress; and he figured out in detail the amount of brush put into the Stanton mattress was 10 per cent. more than put into the mattresses in the big contract at Savannah. Without going into details, unless you think that is apparently a mistaken statement, would you consider that that was somewhere near the facts, or would you prefer to figure it out in detail?

A. Well, roughly figuring I should say the extra amount of fascines in the Stanton mattresses was as much as the proportion of the upper layer, one fascine every 6 feet, is to the lower layer where they are continuous. Now, as the lower layer where they are continuous, they would be somewhat about, somewhere between 6 and 8 fascines close together, 6 to 9 fascines to 6 feet, and in the upper layer, one every 6 feet, so there would be an addition of one-sixth to one-ninth in just the fascines alone, very roughly speaking.

Q. That would be about what?

A. And that percentage would be from 11 to 16 per cent. more. Now, that per cent. would diminish according as to how the fascines were jammed together or mashed together in the lower layer, so one-tenth is not at all unreasonable. * * * The Stanton binders and poles were not more than 5 inches in diameter at the butts and not less than 2 inches at their tips, so that they are a lighter pole than the Carter specifications, they are smaller in volume, smaller in cross-section, less in stiffness.

Q. Assuming that the cross sections are correct, there was 10 per cent. more brush in the Stanton mattress, and only one-half as much grillage poles, and that otherwise the mattresses were identical, would that difference make any appreciable difference in the cost of the two mattresses?

A. *I should not expect very much or any difference in the prices of the mattresses. I should not look for any appreciable difference in the contractor's bids between those two mattresses at all.* The prices that we got for mattresses on those openings there were so exceedingly divergent that it would be very difficult to say what any figure of a contractor would be. I looked these up the other day because they are in the annual reports of the Chief of Engineers; I looked them up in my own interest. I may have them, I think I have them here; yes.

Q. Please state what those prices bid there were by the different contractors? Are you referring now to the second contract you made or to the first one?

A. I have a rough note of both of them, which can be easily verified by referring to the annual report of the Chief of Engineers for details.

Q. And you are now referring to prices bid for brush mattresses per square yard, are you not?

A. Yes. The first contract is with one Howell, the price per square yard as accepted was 57 cents.

Q. He was the man who failed?

A. He was the man who failed. And the highest bid was $6 per square yard. Now, on the next contract it went to Gaynor at 70 cents, and the highest bid on mattresses was 90 cents a square yard.

Q. That contract was let by you to Gaynor at 70 cents for mattresses by the square yard?

A. Yes.

Q. Prior to the time Carter let the big contract to Greene and Gaynor at Savannah, October, 1892?

A. Considerably, yes; this was in 1889 and 1890.

Q. *Now, Major Stanton let a contract in October and November, 1892, at Winyaw Bay, the same place where you let your contract, and he paid 35 cents a square yard more for the same kind of mattress than you paid, did he not?*

A. *Yes; Stanton's contract of November 8, 1892, which was two years—about two years later, he paid 35 cents more per square yard.*

Q. *Would you, if you were passing upon contracts as a Division Engineer of the United States Army, would you consider that the letting of the contract by Major Stanton for the same kind of a mattress in the same place at 35 cents a square yard higher than had been paid was an error of any kind on the part of Major Stanton?*

A. *No, indeed.*

Q. *Such differences were to be expected in doing that kind of work, were they not?*

A. *Always to be expected.*

Q. These mattresses which you bought at Winyaw Bay by the square yard and Major Stanton bought at the same place by the square yard, there is not as much in the amount of the purchase as was purchased at Savannah under the big contract of 1892, is there?

A. No; they were, I have a note here, that is from the annual report of the Chief of Engineers, that the amount of the first contract with Howell, who failed was about $80,000 worth, and the second with W. T. Gaynor in 1890, was about $180,000 worth.

Q. Isn't it true that a smaller amount of brush fascine or brush mattress can be obtained more readily than a very large amount, due to the fact that the brush is more accessible and that in small amounts you could get it very much more easily while in large amounts you would have to go long distances for it?

A. That is generally true." (Rec., 8497-8508.)

"Q. I want to ask you if, in making your contracts for brush mattresses at Winyaw Bay, you considered that you were paying four times as much for brush fascines, as if you had bought the brush fascines? *Mr. Erwin makes this claim, that the purchase of brush mattresses per square yard is equivalent to paying four prices for brush fascines. Is that true?*

A. *I do not consider it so.*

Q. Is it equivalent to paying three prices for brush fascines?

A. I have never deliberately bought brush fascines outside of mattresses; always brush fascines built into the mattresses; and the labor of building brush into choked fascine and putting them into mattresses with binder rods and binder poles in grillage form adds very greatly to the cost of the brush.

Q. *As a matter of fact, a brush mattress by the square yard is an entirely different structure from buying brush fascines by the cubic yard, piled up like cord wood?*

A. *I have always considered that it was.*

Q. *Is there any comparison to be drawn between the two unless you go into details of how much the cost is?*

A. *I think not. I think you could not go into a comparison without weighing the details.*" (Rec., 8682-83.)

Lyman E. Cooley, a prominent civil engineer of Chicago, testifies in Carter's favor:

"Q. Criticism has been made on Captain Carter that these specifications purchased brush log mattresses by the square yard instead of purchasing brush fascines by the cubic yard; you have gone over the history of how these contracts were let and how these specifications were approved; would you not consider that the ultimate power

of determining how that should be done was in the Chief of Engineers?

A. Surely.

Q. And that it was his duty, if there was anything wrong about it, to stop it?

A. Surely, that is what he is there for.

Q. Will you look at that contract there and see if an ordinary engineer of average intelligence, in looking at that contract, would not be able to tell that those brush log mattresses were being purchased by the square yard instead of being purchased by the cubic yard of fascines?

A. I did read it, and I got no other impression than the square yard.

Mr. Erwin: You are referring to what you call the big contract of 1892?

Mr. Stone: The big contract of 1892, yes.

Q. Colonel Bixby has testified that instead of Carter inventing the scheme of purchasing brush mattresses by the square yard in order to help Greene and Gaynor and defraud the Government, that he himself, Colonel Bixby, had made two contracts prior to that time, one a year before and one two years before, for the purchase of brush mattresses by the square yard; he also testifies that Captain Black made contracts for the purchase of mattresses by the square yard, and he also testified that Major Stanton, who was one of the judges who sat upon Carter's court martial, made contracts for the purchase of brush mattresses by the square yard at almost exactly the same time that Carter made the contract for the purchase of brush mattresses by the square yard at Savannah, and that the price paid by Major Stanton was 10 cents a square yard higher than the price paid by Carter under the big contract at Savannah. *Upon that state of facts, could you imagine that Carter called for brush mattresses by the square yard for the purpose of defrauding the United States?*

A. *No, sir. That was the usual unit of measurement in those days.*

Q. Colonel Bixby testified that there was no comparison to be drawn between the purchase of brush mattresses by the square yard and brush fascines by the cubic yard, because brush fascines by the cubic yard were bought piled up like cord wood, while brush mattresses

by the square yard was a structure which required a large amount of work to manufacture and that they were entirely different things; would that be your opinion?

A. Yes, sir, and further, that the general proposition is that *you measure your product at the last point of the industry,* measure the finished product that you are using, if possible." (Rec., 8546-47.)

Not only were mattresses always purchased by the square yard on the Atlantic coast, but the Government saved a large sum in buying them in that manner under the big contract, over what would have been paid, had those mattresses been bought as the complainant now contends they should have been.

The contract price of fascines under the big contract was $1.60 per cubic yard. Inasmuch as it required only 10 of those, at most, to make a cubic yard, as they were piled up for measurement, and as it required 6 to make a square yard of mattress, as actually built, the Government would have paid 96c per square yard, simply for the loose fascines required for a square yard of mattress. (Rec., 8085-87.)

It cost an average of 23c per square yard to manufacture loose fascines into mattresses (Wy. 3590); hence, the cost of the mattress would have been $1.19 per square yard. Purchased in the manner in which they were, the price paid was only 95c per square yard. (Rec., 8085-88.)

In trying to overcome the foregoing overwhelming evidence, the complainant's solicitor takes a mattress design of General Q. A. Gillmore, prepared in 1880 and never used (Rec., 3967), and tries to compare that abandoned design, at the price some contractor once bid on it, with Carter's mattress. He does this by taking a *part* of that abandoned design, dividing the total assumed price by that part taken, so as to get what he says that *part* would cost, and then comparing what he thus gets with the price paid for Carter's mattress, so as to make it appear that Carter's mattress cost much more than Gillmore's did.

Colonel W. H. Bixby, Corps of Engineers, testifies that no reliable results can be obtained by such a method, saying:

"A. No, I do not see that you can divide it up in that way. I want to explain myself. It has been said that steel costs so much a ton as steel, but when it is built into watch springs it costs a good deal more; there is a great deal of difference in the price per ton when it is in watch springs; it is enormously different from what it is in the

crude steel, unworked. Now, here is brush put into a mattress with binders and poles, laid in three layers crosswise, of each other, choked up and pushed up against each other, and binders put on and choked up tight and fastened. Now, *you cannot get the price of a one-third thickness of a mattress by dividing the cost of the whole mattress by three.*" (Rec., 8636.)

The complainant's solicitor then tries to make it appear that Carter's fascines are the same as the bundles of brush in the old abandoned Gillmore design, but COLONEL BIXBY testifies:

"A. I should not understand that they were virtually the same." (Rec., 8637.)

For evidence as to the failure of the contractor to furnish brush mattresses at 57c and at 70c per *square yard,* see (Rec., 8042-43, 8112.)

For evidence that the two mattresses built by Captain Black in 1888 cost "60 to 65 cents" per *square yard,* without allowing anything for contractor's profits, see (Rec., 697-98.)

For evidence as to the purchase of brush mattresses at 70c, 74c and 97c per *square yard* in 1888, 1890 and 1891, see (Rec., 8042-43.) See, also (C. M. Def. Ex. 24).

For evidence that Major Stanton paid $1.05 per *square yard* for brush mattresses at Winyaw Bay, S. C., in 1892, see (Def. Ex. 111). (Rec., 8028-31.)

For the report of the Board of Engineers, December 18, 1895, estimating the cost of brush mattresses at $1 per *square yard,* see (C. M. Def. Ex. 23).

For the evidence showing that brush mattresses were never purchased by the *cubic yard,* as the complainant now contends, but that they were always bought by the *square yard;* and that the present claim of the complainant has been manufactured *since the court martial,* see Request No. 17; see, also (Rec., 8210-13, 8117-27, 8271-81.)

For the evidence that Gillette figures 16 brush logs in a cubic yard, whereas there are only 9 or 10, see (Rec., 8085-88, 8443-45).

For the evidence that Gillette paid 75c per cubic yard simply to make brush logs into mattress form, see (Rec., 4561-74).

The evidence that Gillette made false statements to the court, as set forth in detail in Requests 17-a to 17-g, inclusive, has been referred to in detail in the Requests themselves, and need not be repeated here.

COLONEL W. H. BIXBY, Corps of Enginers, testifies concerning the drawings mentioned in Requests 17-d to 17-g, inclusive:

"Q. Your attention has been called to diagrams of mats, and so forth, in which the scale of the poles is on one basis and the scale of the fascines is on an entirely different basis. If you were a judge, and had to pass upon a question of the value of those mats, would that diagram without further explanation or without referring to the work, be a correct basis upon which to act?

A. The proper way to make a diagram is to make it all on one scale.

Q. If it is made on one kind of scale as to one thing and on another scale as to another thing, it is apparently misleading until you look into it, isn't it?

A. It is sometimes misleading.

Q. For instance, if you were going to compare a white horse with a black horse, and they were exactly the same size, and a diagram is made, we will say, showing the black horse four times bigger than the white horse, that would be misleading, wouldn't it?

A. Yes.

Q. That would be a different scale, wouldn't it?

A. It would be apt to mislead; a thing like these drawings would require a careful examination of the text of the specifications in order to be sure of what you were getting at." (Rec., 8682.)

For further details, see (Rec., 8028-31; 8041-45; 8085-88; 8122-28; 8210-13; 8271-81; 8224-45).

—18—

CASSIUS E. GILLETTE.

The quotations from the testimony of Gillette and Rees, under this heading, are from the court martial record, and said testimony is a part of this case, by stipulation. The references to that testimony have already been given in Request for Findings No. 18.

—19—

CUMBERLAND SOUND AND SAVANNAH WORK OF 1896.

There is no pretence that any of the securities, etc., in court ever came from the 1896 contracts. (Rec., 7299-7319.)

The last purchase of any of the securities received by Carter from Westcott was made by Westcott December 22, 1896, as appears by Complainant's Exhibit 319, Division 30.

The first payment on the 1896 contract was July 6, 1897, as appears by the same Exhibit, Division 32.

Hence, it is impossible that any of the money in court came from the 1896 contracts.

For evidence that Carter was ordered by the Chief of Engineers in 1896 to buy brush mattresses of Greene and Gaynor at $1.10 per square yard, see plans, specifications and contract with Greene and Gaynor signed by the Chief of Engineers, which is Complainant's Exhibit 86.

The testimony of the Chief of Engineers that he advised the Secretary of War, etc., has already been quoted in Reference No. 17.

The testimony of Twiggs is as follows:

> "I think the mattresses built at Cumberland Sound were better than the mattresses I saw at Savannah Harbor." (Rec., 1154.)

That Gillette was the author of the charts, comparisons, etc., made by Bacon, is shown by Gillette's own testimony as follows:

> "Q. Some plats or maps have been put in evidence here during the testimony of Mr. Bacon, showing by comparison the work done under your charge and that done under Captain Carter's charge; were they made according to your direction, or did he make them of his own selection?
>
> A. I directed him to make them." (Rec., 4464.)

The dates of the sinking of the mattresses, and the dates of the subsequent taking of the soundings are found in Complainant's Exhibit 5, 5-F, G, H, & I, in Hewlett's record, Vol. 1, page 13 (See also Rec., 8343).

For the method of taking those soundings, see (Rec., 8144-46; 8344-45).

As to the mattresses being buried by the sand, see as follows:

> "*Mats are sanding to the crest—sand can be felt in top course.*" (Report Twiggs, Apr. 8, 1897, with sketch.)

"Examined mat work in north jetty; sand collected all through mat; no mattress work destroyed." (Report Twiggs, June 10, 1897.) (Def. Ex. 121.)

E. R. CONANT testifies as to the mattresses which were sunk at Cumberland Sound:

"* * * * I have sunk mattresses there which after being visited in 24 hours—or hardly 24, in 48 hours—would show indications of being silted at that time. * * * *Silting took place almost immediately after the mattress was put in place.*" (Rec., 1620.)

As to Bacon's charts, etc., giving Gillette credit for everything he put in, and giving Carter credit only for part of what he put in, Bacon admitted on cross-examination as follows:

"A. In that comparison I allowed Captain Carter *nothing* that did not appear above the line of the original bottom." (Line A-B.)

"Q. Well, in that comparison did you allow Captain Gillette anything that was below that line A-B?

A. Certainly, I allowed *him for all the work he did* in cases where *his* original bottom fell below the line A-B." (Rec., 4475.)

COLONEL W. H. BIXBY, Corps of Engineers, testifies concerning the charts of Bacon and Gillette as follows:

"Q. * * * Suppose you should sink mattresses on an ocean bar, the mattresses being 50 feet wide and 100 feet long and 12 feet high, would the sides of the mattresses begin to fill up with drifting sand and mud and so forth to any extent?

A. I should expect them to fill up.

Q. Well, for instance, suppose the mattresses were 12 feet high when you put them on the bottom, would the sand drift along against the side of them so it would fill up one or more feet along at the edges of the mattresses?

A. It would be very apt to; it all depends upon the accretion, but from what I have known of Winyaw Bay and from having been in and out of Winyaw Bay, and from what I know of the Savannah river from being in it, the conditions would force me to do differently at one place than the other.

Q. I am speaking of Cumberland Sound rather than Savannah Harbor, are you familiar with that?

A. I do not know Cumberland Sound, though I have been on the Georgia coast; I know Cumberland Sound's general location on the map, which would be very much like the outer harbor at Savannah.

Q. You mean like Tybee Roads, or further out?

A. I cannot say too well about it, I do not know Cumberland Sound well enough to make a distinct comparison, except that the neighborhood is on the sand drifting and bearing section of the coast.

Q. The sand does drift there, does it?

A. All along the coast sand is drifting, and along the whole length of places that I went to I found those conditions, from Virginia down to Florida, it was always a drifting sand beach which had to be fought.

Q. If you could put a structure down there 100 feet long, 50 feet wide and 12 feet high, you would expect the sand to pile up against the side of it, would you not?

A. I should.

Q. If after the sand had built up the side of it, you went and measured the structure and dropped your measure down close to the side of the structure and stopped it there when you struck the sand which had drifted up against it and calculated that that was the entire depth of the structure, you would miss some of it?

A. I should not expect to get the depth of the mattress unless I felt for it with a pole that I could reach under with.

Q. The way I spoke of would not be a correct way of measuring it, would it?

A. I would not expect to get any definite measurements that I could depend on." (Rec., 851-16.)

After Carter had put in the foundations for the work at Cumberland Sound, under the 1896 contracts, Gillette became his successor, and threw more or less rock on those foundations, thus producing a good harbor.

In the present case, Gillette gives himself credit for all the rock he used, and by his false measurements, gives Carter credit for only a part of what he used, and then Gillette claims that the work he did cost much less per cubic yard than the work Carter did, and that he deserves great credit for the success of the improvement at Cumberland Sound.

LYMAN E. COOLEY, one of the ablest civil engineers of America, testifies concerning Gillette's claims and the charts Bacon prepared as follows:

"Q. Now, Gillette, who was Captain Carter's prosecuting witness, prepared elaborate sheets of paper in which he seeks to show that he, Gillette, performed some work at Cumberland Sound on a great deal better and cheaper basis than Carter performed work there. It appears that Carter put in the foundation for the work at Cumberland Sound, and after the foundation was put in, Gillette came along and dumped some rock on top and finished the structure; would there be any comparison as to the engineering skill required to put in the foundation there, and the engineering skill required to dump rock on the foundation after the foundation was completed?

A. *I should say the brains had been expended when the design was made and the work initiated.*

Q. *When the foundation was put in?*

A. *And that the rest was a matter of routine?*"

"Q. In order to make up this extraordinary statement of Gillette's in which he claims he put rock on that foundation for one-fourth per cubic yard of what the foundation cost, Gillette has made or caused to be made or adopted, certain measurements of the mattresses which Carter put in. It appears that these mattresses, which we will assume were 50 feet wide and 100 feet long and 9 feet high, were put into the work at Cumberland Sound by taking them to the place where they were to be sunk, and then loaded with sufficient stone to sink them, and that they sunk upon the bottom; and it appears also that at that place the sand of the ocean was constantly shifting. Those mattresses when thus sunk upon the bottom would immediately stop the sand that was drifting against them, and the sand would pile up on one or more sides of the mattress, a considerable amount, would it not, depending upon the amount of the movement of sand and water?

A. Why, that is the very object of dyke action and training works for that matter, to warp up the spaces that are not to be used for the channel by means of deposits.

Q. Now, if, after that had taken place, after the mattress had been sunk and after one or more days had elapsed and after this sand had drifted against it, if you

went out there to measure that mattress and measured down on the side of the mattress to where you struck the sand that was piled up against the mattress and then calculated that that was the total depth of the mattress, you would not make a correct measurement, would you?

A. No, sir, it would be subject to error.

Q. And if some of those measurements should be made three weeks after those mattresses were put in, the chances are that they would not be anywhere near correct, aren't they?

A. Probably. I don't know how active the forces are at Cumberland Sound. I know on some of our Western rivers it would be lost in a sand bar long before that, in many cases.

Q. And if some of the witness who were familiar with that work, testified that those mattresses sanded to the crest in many instances and sanded nearly to the crest in other instances, that would show that such measurements were absolutely misleading and false, would it not, if made two or three weeks afterwards?

A. In the field, surely.

Q. *And if some of those witnesses testified that this mattress would sand to the crest or almost to the crest in 48 hours and the measurements were made three weeks afterwards, that would be an utterly false foundation upon which to base an estimate, would it not?*

A. *The data would be valueless.*" ((Rec., 8798-8800.)

For further details as to the charts and comparisons being wrong, see (Rec., 3746-47; 8146; 8149; 8343-46).

For details concerning those false measurements, see (Rec., 8143-48; 8342-44).

But this is not the first time Gillette has submitted false soundings to the court. With regard to the false charts he submitted to the court martial, the following is of interest:

George Y. Wisner, Director American Society of Civil Engineers (who, together with H. C. Ripley and A. E. Kastl, both members of the American Society of Civil Engineers, made a careful examination of the mattress work at Savannah and at Cumberland Sound, in December, 1897, and January, 1898), testifies:

"Q. Now, have you made an examination of this breakwater; the Tybee Breakwater, so-called?

A. Yes, sir." (Rec., 2627.)

"Q. You know the soundings taken are correct?

A. I do."

"Q. Did you make a similar investigation of the jetties at Cumberland Sound?

A. Yes, sir." (Rec., 2628.)

Wisner explains Gillette's false charts of the Tybee breakwater (Savannah Harbor), etc. (Rec., 2642); and he testifies that *the jetty was actually "three feet higher" in some places, and in other places "five feet higher" than Gillette represented it.* (Rec., 2644-45.)

Wisner testifies that his soundings are accurate (C. M. 2456), and that his chart correctly represents the work, saying "I know it does" (Rec., 2647); and that it shows substantially that no material put into the work by Carter is missing.

Wisner further testifies that Gillette's action in stopping the work in an unfinished condition was "very damaging." (Rec., 2648.)

Wisner further testifies that the profile submitted by Gillette is "of no value, no use which it could be used for." (Rec., 2651.)

With regard to Gillette's chart of Cumberland Sound, Wisner testifies that his own survey shows the jetty is actually *"ten or twelve feet" higher than Gillette represented it in his charts* (Rec., 2653-54); that the brush mattress work done by Carter extended to the top of the jetty and, in general, was well sanded over (Rec., 2657); and that the actual crest or top of the jetty in many cases *"stood above"* its original place (Rec., 2656), thus showing that it had covered with sand and was in good condition.

Wisner further testifies, not only that Gillette's charts are false (Rec., 2652-54), but he says of Carter's work:

"The indications are of heavy sanding up, the brush and rock was found for the full width of the jetty, and on the outside the sand two or three feet higher than the surface of the jetty itself." (Rec., 2655.)

Wisner's testimony, which proves that the work had not deteriorated, but was in the same order it was when done, is as follows:

"Q. And in general, did the longitudinal profile, as taken by you, stand above or below the line showing the present average crest for a width equal to the original width of the top, *as shown by the original records?*

A. *It stood above."* (Rec., 2656.)

Wisner testifies that the work done at Cumberland Sound had resulted in "a good mattress foundation" (Rec., 2792),

and that, if at a later date, any of the brush mattress work should be destroyed, it would be due to the stopping of the work in an unfinished condition, saying:

"*That would be the fault of not completing the work.*" (Rec., 2787.) See also (Rec., 8271.)

After making extravagant claims that Carter did everything he could to enable Greene and Gaynor to put in brush mattresses at a big profit, the complainant now turns completely around and says that, under the Cumberland Sound contract of 1896, Carter tried in March, 1897, to help Greene and Gaynor surrender part of their contract for brush mattresses, and take a dredging contract in place of it. Every claim by the complainant (in other places) is that the dredging work was less profitable than the mattress work.

The principal object in making the foregoing charge against Carter was to get in the testimony of one Carvalho, who claimed to be an expert on handwriting, and who gave his opinion that one of Carter's clerks (named Connolly) had forged somebody's name to a paper in connection with that proposed dredging, which dredging (by the way) was never done. (See Rec., 8266.)

An instance affecting the credibility of this witness Carvalho is given below:

Carvalho testified for the complainant, as a so-called expert on handwriting, that B. D. Greene forged the endorsement of Anson M. Bangs on a disbursing check issued by Carter; which check was issued to Bangs in Savannah, Georgia, on April 5, 1895, and was paid in New York City on April 9, 1895. (Rec., 2352.)

Carvalho was then asked whether, if it were proved that B. D. Greene was in London at that time—(thus making it impossible for Greene to have written that endorsement)—he would change his testimony, and he answered "No, sir." (Rec., 2394.)

It was then proved beyond a doubt that B. D. Greene was in London on April 5, 1895, the very day on which that check was drawn in Savannah, Georgia; that Greene sailed from Liverpool, April 6, 1895, on the *S. S. Lucania*, and that Greene did not reach New York until April 13, 1895, which was *four days after that endorsement was written and the check paid;* and that Carvalho's sworn testimony was deliberate perjury. (Rec., 2450.)

The other government witness on this same point is J. W. O. Sterly, who admitted on the witness stand that he had com-

mitted perjury in other matters connected with this case. (See Request for Findings No. 46.)

There is a minor charge against the Cumberland Sound work, which is as follows:

It is alleged that contractors were led to believe the contract for the work at Cumberland Sound in 1896 was a large stone contract, whereas in reality it was a large brush mattress contract.

The way in which the complainant's solicitor tries to make this appear is as follows:

The total of the Cumberland Sound contract of 1896 was about $2,150,000. (An. Rep. C. E. 1897, p. 1530.)

Captain Carter ordered brush mattress work amounting to a total of about $490,000. The remaining $1,660,000 was to be stone.

The complainant's solicitor takes the entire $490,000 of brush mattress work (which had been completed); and instead of taking the entire $1,600,000 of stone work (which had not been completed), he took only the stone which had been used to sink the foundation mattresses, namely, about $80,000 of stone; and then states that the brush mattress work under the contract was very much greater than the stone work. Had he stated the whole truth, *i. e.*, that only the sinking load of stone had been put on the mattresses, and that about $1,580,000 more of stone was yet to go on that foundation as the superstructure, no one could have been deceived or misled.

Another minor charge against Carter in connection with the Cumberland Sound work is as follows:

It is alleged by the complainant that the official project for the improvement at Cumberland Sound required a single course of mattress foundation, and that Carter changed that project in order to use more mattress work, and that this is proved by Carter's monthly reports, which mention a "hearting of mattresses," etc.

The contention of the defendant is that, inasmuch as the Board of Engineers, which prepared the Cumberland Sound project, estimated for 6 courses of brush mattresses, and as under such a project Captain Carter had the right to use more or less than 6 courses—(the 6 courses being simply an estimate),—it was perfectly proper for him to have used 14 or more courses of mattresses wherever necessary.

The language in Carter's monthly report, containing the phrase "a hearting of mattresses where admissible," came

from old reports and referred to the old (as well as to the new) part of the project, and was a perfectly proper expression to be used.

GEN. W. P. CRAIGHILL, Chief of Engineers, testifies in Carter's favor, that the phrase "mattress hearting where admissible" is a perfectly proper expression:

"Q. You see where the phrase 'hearting of small stone' occurs in the project, and here a 'hearting of mattress' occurs. Is that not a difference of expression and description?

A. It says, where admissible; that is to say where, in the judgment of the officer; that is the way I would understand it; where, in the judgment of the officer, under those conditions that are in the specifications, which are a part of the contract, he considered it proper. That is what I should suppose that meant." (Rec., 3440.)

COL. T. H. HANDBURY, Corps of Engineers, who was a member of the Board of Engineers which made the project for Cumberland Sound, testifies that what Carter did was in accordance with the project of that Board:

"Q. And as to the intention of the Board, or so far as you know its intention, to limit the Engineer Officer in charge of the work to a foundation of brush mattress, or a thin foundation of brush mattress,—was any such discussion had?

A. I don't think there was any discussion bearing on that point whatever. I don't remember of any, and had there been any, I certainly should have remembered it.

Q. Was there any intention expressed before that Board as to limiting the Engineer Officer as to the thickness of his brush foundation?

A. None that I remember; none so far as was in my mind as a member of the board." (Rec., 3504.)

"A. It must be understood that, when a Board acts upon a general project like that is, there is a great latitude left to the Officer in Charge, and that Officer in Charge has the arrangement of the material in the jetty. *It was perfectly proper for him to arrange those materials as he might think best in the interest of the service. The Board don't go into such details as that.* The estimate the Board makes is usually made more for the purpose—The cross-section of these figures that are mentioned in that, are more for the purpose of getting at a

general estimate of how much it is going to cost, and getting the matter before Congress, so that they can make an appropriation. The Officer in charge carries out the general plan of the work." (Abst., 3515.)

"Q. An appropriation was made by Congress specifically upon your project—the project you signed; the work of construction went on under that project, and I have asked you if, as a member of that Board, you had in contemplation a construction of that kind which I have described to you,—of the six and eight courses of mattresses?

A. I don't know that that matter was discussed before the Board. In fact, so far as my recollection goes, it was not. Those things were left entirely to the Engineer Officer in Charge. The Officer in charge was a member of the Board. He made up that estimate himself, and, in fact, he wrote the report.

Q. And you accepted it?

A. After discussing it and understanding it thoroughly, we accepted it." (Rec., 3515.)

"Q. Now, in relation to that charge of construction, it is something of a modification of the project, is it not?

A. I should not think it was.

Q. No modification at all?

A. No modification; that is what would be naturally expected under certain circumstances.

Q. The project does not provide for any hearting of mattress, and you find it in the construction so far as it has gone on; is not that a departure from your project,—a modification of it?

A. I should not think it was. It is a mere omission of words probably. If some member of the Board had suggested the words, 'Hearting of brush and stone,' it might have gone in there. Those things must be taken into consideration, especially in works of this character,—must be taken with a very liberal allowance to the man who is to be responsible for the construction." (Rec., 3524.)

The WITNESS: *"I should not regard that as a modification of the contract."* (Rec., 3525.)

GEN. WILLIAM LUDLOW, Corps of Engineers, testifies the Cumberland Sound Board estimated for 6 courses of mattress work, and that Carter's action was not a departure from the project:

"Q. The extension being 650,000 square feet super-

ficial area of foundation, or 72,000 square yards, as a member of that Board, how many courses of mattress work would you say were contemplated by the report and the chart taken together?

A. Divide one figure by the other, and you get it.

Q. The superficial area is 72,000 square yards and the Board estimates 425,000 square yards approximately?

A. About six courses of mattress work." (Rec., 3006.)

"Q. The use of the plural 'mattresses' in the specification might still apply to a single course of mattresses laid along the line of the jetty as a foundation?

A. I should think it might apply to a single course or more, according to the circumstances of the case." (Rec., 3007.)

MAJOR F. A. MAHAN, Corps of Engineers, testifies the Board estimated for 6 courses of mattresses, and that Carter's actions and reports under that project were proper:

"A. I should say that the intention of that project was to make the foundations of the jetty of brush mattresses an average of six mattresses in thickness, or 6 courses in thickness." (Rec., 3058.)

"Q. Suppose the engineer in charge should find the mattress work, as reported by his inspectors, sanding up to the crest, and he should believe that a little greater height of mattress would be beneficial to the Government, would he, in your opinion, as an engineer, be justified, in gaining height of mattress work in the manner indicated, in the ideal cross section, Defendant's Exhibit 20, by shortening his upper four courses of mattress work to 80 feet, thereby giving him the opportunity or giving him available brush, within the limits of the project, to make his foundation 8, instead of 6 courses of mattresses?

A. Undoubtedly; I think he would be justifiable in reducing it to 4, if necessary." (Rec., 3080.)

"Q. I will ask you if the word 'Mattress hearting' referred to the new work or to the old work?

A. So far as I can make out from everything which has been read, I should say that there were at least, two projects, possibly, more, in connection with this work, one of which was the original project, several years old; the other additional or revised project, made necessary by experience in the development of the work. The orig-

inal project requiring a hearting of mattress, undoubtedly carried out. What was done subsequently, was probably to leave out the hearting of mattress, in order to get greater weight to resist storms from the ocean." (Rec., 3059.)

"Q. I will ask you if in your opinion, the language 'Mattress hearting' as used in this connection, could properly be referred to the old work, and not have been in contemplation of the accused in reference to the new work, regarding the entire project as a whole, and given as begin by that extension a new project?

A. It undoubtedly, I should say, refers to the old work, and to such repairs as may be necessary." (Rec., 3060.)

The WITNESS: "The interpretation of all those things is to be taken from the beginning; you cannot start after the beginning." (Rec., 3075.)

"Q. Upon a project which provides specially for a hearting of small stone, would you in reporting upon such work, report specifically that it provided for a hearting of mattress?

A. If at some point before that time, a hearting of mattress was provided for, and a subsequent report, relating to another part of the work, provided for a hearting of small stone, I should unquestionably return to the original report and specify a hearting of mattress.

Q. When would you take the present project into consideration at all?

A. I should take the present project into consideration at the point at which it begins." (Rec., 3076.)

"Q. In that cross section there at the top of the black board, which is Exhibit 417, if you found your work—you had put a six course mattress at the bottom, that under the project of the Board of December, 1895—and you found from some local causes the structure was sinking, subsiding, would you feel justified, under the specifications, in putting another multiple mattress on top of it?

A. Why undoubtedly; the object is to get a jetty." (Rec., 3088.)

"Q. If you found considerable subsidence after having put your six course mattress, as shown in Exhibit 417, and to overcome the subsidence, you had placed another multiple mattress on top, and thereafter, if you had covered the whole structure solely with riprap stone, overlaid with covering of large stone, would you call this second

mattress, the top one on the subsiding structure, would you call that 'hearting' or 'foundation'?

A. I would call that the secondary foundation. In other words, the first foundation has gone down, and you renew it.

Q. If the project of the Board called for 425,000 square yards of mattress, and as we have worked it out, indicating thereby six courses of mattress foundation on the 6,500 feet extension of the jetty, and if, when you had finished all of your mattress foundation all over the 6,500 foot extension, in some places eight courses, and occasionally fourteen courses on subsiding places, as I have described, and at the end you had found that you had used about 430,000 square yards of mattress, or say 446,000 square yards of mattress instead of 425,000 as contemplated by the report, would you consider that you had departed materially from the specifications?

A. No, not at all. That is a reasonable percentage to allow in calculations." (Rec., 3088.)

Col. W. L. Marshall, Corps of Engineers, testifies that Captain Carter's reports and acts, under the Cumberland Sound project, were all right:

"Q. I will ask you, having read the whole report, and being advised of the circumstances that mattress hearting does in fact, exist in the older work, I will ask you if there is any impropriety in Capt. Carter referring to mattress hearting wherever admissible, in the connection in which it is referred to in that report?

A. *I see no objection to it at all.*" (Rec., 3186.)

"Q. Suppose you had that report of Capt. Carter before you, without date, and you had before you the project of the Board of December, 1895, without date, do you think that you could determine that they had any relation, each to the other?

A. You mean the monthly reports?

Q. The synopsis?

A. Yes, sir, I think if I had the two together, I could, taking the reading, the punctuation and the way that report is made I can.

Q. Then it comes to a matter of punctuation?

A. It comes to a matter of English; what I understand by an English sentence.

Q. Then a comma after the word 'stone' and a comma after the word 'admissible,' makes that parenthetic?

A. Yes, sir, it makes it parenthetic. The whole thing taken together describe the work as it exists and will exist when completed. *It is a complete description of those jetties at the mouth of Cumberland Sound, in my opinion.*" (Rec., 3188.)

The WITNESS. "*I simply state that I regard that as a fair statement of the way that project as a whole is to be accomplished, the project stated in that report.*" (Rec., 3189.)

"A. How was the old work? That describes the whole jetty.

Q. The old work contained, or I assume it did contain for the purpose of this question, mattress hearting.

A. It did contain it?

Q. Yes.

A. My understanding is that if it contained a brush hearting at any part of it, 'where permissible.'

JUDGE ADVOCATE: Where it is 'admissible.'

WITNESS: I think that covered any part of the work that contained brush hearting. I think that description is a correct description of the means by which the project is to be carried out." (Rec., 3173.)

The WITNESS: "I would not report that the present project for further work involved a hearting of mattress, but when I was describing the project as a whole, as executed and in place, if that hearting existed there, I would certainly use it and put in the general description of the work the words 'hearting of brush.'" (Rec., 3182.)

The WITNESS: "The ultimate jetty includes the old work as well as the new." (Rec., 3183.)

The WITNESS: "When reporting on the present project it is always customary to give a resume of the work as previously carried on." (Rec., 3183.)

When asked whether he would report to the Chief of Engineers in case he used a second course of multiple mattresses for the foundation, as Carter did, COL. MARSHALL, replied:

"A. If it had disappeared so that the second mattress would be substantially the foundation of the completed jetty, I would not." (Rec., 3178.)

MAJOR THOMAS H. REES, Corps of Engineers, testifies in Carter's favor:

"Q. 'Any work executed during the year should be done by contract, as prescribed by the Act of June 3, 1896, and should consist in extending and raising both

jetties as provided in the project approved by the Act, and given in detail in the report of December 18, 1895.'

Is there anything contained in the matter which I have read to you from this project which suggests that the work of extension should consist of a mattress hearting?

A. I think not. If the work of extension is to be carried on in accordance with the provisions of the report of the Board of 1895, a mattress hearting would be inadmissible." (Rec., 2854.)

"A. I remember that there were portions constructed while I was here which had a mattress hearting, and I should consider that the words used in the report or letter and referring to the project as a whole,—the words 'mattress hearting,'—would refer to the mattress hearting there existing as being inadmissible in the extension and the raising of the new jetties under the new project, —under this project for the expenditure of the appropriation.

Q. And would you infer from the portions of this letter read, that it was the intention to put a hearting of mattress in the new work?

A. I would not." (Rec., 2855.)

The WITNESS: "There is nothing shown there that would constitute, in my opinion, a hearting of mattresses." (Rec., 2855.)

"Q. What would be the hearting on that structure of which that is the ultimate cross-section?

A. This portion of the interior which shows the small stone, I would call the hearting, and call it a hearting of small stone, because it is to be covered by larger and heavier stone.

Q. And what would you call the mattress in that cross-section?

A. I would call that a foundation of brush mattress.

Q. A foundation of brush mattresses with a covering of small stone and a covering or coping of large stone.

A. That is what is represents." (Rec., 2855.)

COL. W. T. ROSSELL, Corps of Engineers, testifies in Carter's favor:

"Q. Suppose the 650,000 square feet superficial area underlying the new work is estimated, being approximately 72,000 square yards, and the report of the Board estimated 425,000 square yards of mattress work,—how

many courses of mattress would you think was contemplated by that project?

A. It would be a matter of division,—be about six courses." (Rec., 3001.)

Col. J. H. Willard, Corps of Engineers, testifies in Carter's favor:

"Q. Is that such a synopsis as you yourself would have made, if you had that project before you, and were the Engineer Officer in charge?

A. I think that that is the proper synopsis, in stating what is to be done." (Rec., 3100.)

The Witness: "Oh, well, that project takes in the work as a whole; there was mattress hearting, as I understand." (Rec., 3101.)

Major C. McD. Townsend, Corps of Engineers, testifies in Carter's favor:

"A. I should consider that that expression related to the portion of the existing project which had been completed, and complied with those terms." (Rec., 2948.)

"Q. The proposed extension, as proposed by the Board, aggregated about 6,200 or 6,500 feet?

A. It exceeds 6,000 feet.

Q. Now, Captain, suppose in the estimate of quantities in the report of the Board, dated December 18, 1895, the Board estimated 425,000 square yards of mattress work; how many courses of mattresses, the plan of the jetty being 100 feet wide, how many courses of mattresses would go into the 6,500 feet, 100 feet wide, if there were 425,000 square yards estimated?

A. Each course would consist of about 72,000 yards and there would be about 6 courses." (Rec., 2939.)

George Y. Wisner testifies in Carter's favor:

"Q. But if it had not been reduced to writing, there might be a dispute as to what actually had occurred. If that report of the Board dated December 18, 1895, was accompanied by a tracing drawn to a scale, showing the length of the proposed extension in jetty work, and coupled with the estimates contained in that report, would you have any regard as a constructing engineer to the tracing of the proposed extension?

A. Do I understand that this tracing forms a part of the report accompanying?

Q. Yes?

A. Yes, sir." (Rec., 2604.)

"Q. I will ask you, in connection with that extract, and from your knowledge of the various projects for the improvement of Cumberland Sound, and from your knowledge of the work as far as it had proceeded up to the date of that letter in 1896, whether the description, as contained in the extract which I have just read, with respect to the 'hearting of mattresses' is a correct description, taking the project as a whole?

A. When we consider that a portion of the work was already done, and that that description covers the work from the starting point of the island seaward, it does.

Q. In the work already done, was there any hearting of the brush mattresses?

A. Yes, sir, some mattresses.

Q. 'Hearting of mattresses'?

A. It was log and brush as I understand it from the chief's report.

Q. So that the description 'hearting of mattresses' is a correct description as applied to the entire project?

A. Yes, sir; with the latter portion explaining the new work to be constructed." (Rec., 2605.)

"Q. Having that project of expenditure before you, and having reference to the concluding paragraph thereof, if you were engineer in charge of that work, and having before you the report of the Board of Engineers dated December 18, 1895, would you naturally, from their construction, use a hearting of brush mattresses?

A. No, sir.

Q. Why not?

A. Because it is distinctly stated in the recommendation of the Board that it shall be a brush mattress foundation with a hearting,—I do not remember the exact language,—but equivalent to a hearting of small stone covered with larger ones." (Rec., 2606.)

Major W. M. Black, U. S. Engineers, is the only witness, on this point, for the complainant, and he testifies:

"The Board, after consideration, determined there should be but one thickness to be used." (Rec., 2533.)

But Black was forced to admit that his testimony was not true, saying:

"When the Board of Cumberland Sound was in consultation, the question of the number of mattresses, and

the thickness of brush mattress to be used in the jetty was considered. * * * *I desired in the report to state that this foundation must consist of but one course of brush mattresses; I think that I was overruled there.*" (Rec., 703.)

When Major Black was shown that the mattress work required at Cumberland Sound was only 72,000 square yards, for a single course of mattresses, and that the Board had estimated for 425,000 square yards, which is six courses, he said:

"I give at up; I guess you are right." (Rec., 2555.)

But this is the Major Black who testified about this same matter:

"Well, I don't care to do mathematics, because I can't; my head is not made that way." (Rec., 2549.)

The only two works under the contracts of 1896 are those at Cumberland Sound and at the Tybee Breakwater in Savannah harbor.

Cumberland Sound.

Cumberland Sound is that large body of salt water which lies at the extereme southern end of the Georgia coast, and which flows into the Atlantic ocean between Cumberland Island, Georgia, on the north, and Amelia Island, Florida, on the south. Between those two islands lies the only entrance from the ocean to the sound which is practicable for deep-draft ships.

On the St. Mary's river, which is the only fresh-water stream if importance flowing into Cumberland Sound, lies the town of St. Marys, Georgia; and on the Amelia river, which is simply a salt-water arm of Cumberland Sound, lies the town of Fernandina, Florida.

All of the commerce of St. Marys and 90 per cent. of the commerce of Fernandina are dependent on water transportation through Cumberland Sound. Fernandina is also the Atlantic terminus of the proposed ship canal across the peninsula of Florida.

The United States owns two large military reservations on Cumberland Sound, one known as Fort Clinch, lying at the north end of Amelia Island, and the other known as Point Peter, lying at the mouth of the St. Marys river.

Cumberland Sound is also the southern terminus of what is known as the "Inside Route," *i. e.*, a route practicable for ships of light draft, such as torpedo boats, and

which passes through the various sounds and behind the various sea islands which line the Georgia coast. The St. Marys river, which is navigable by ocean vessels for some 50 miles above its mouth, is of great value to a fleet occupying Cumberland Sound, as it affords a sheltered place where vessels may lie in fresh water.

The harbor of Cumberland Sound is large in extent, of ample depths, and perfectly land-locked, but its development has been retarded by an insufficient depth of water on the ocean bar which lies between the deep water of the sound inside and that of the ocean outside. The sound pushes out seaward a large arm of great width and depth just north of Amelia Island, and south of Pelican shoal, but the outer end of this arm spreads out in the shape of a fan, and the depth diminishes, leaving a body of shoal water between the outer end of the deep basin and the ocean, which is known as the "bar." This bar, which is composed of fine, shifting sand, reaches in a fan-shaped form across the entire entrance to the sound, and was crossed in its original condition by two ship channels, the deepest of which carried a depth of only about 13 to 14 feet at mean low tide.

The water of Cumberland Sound carries very little sand or silt in suspension, and the sand which forms the bar is scoured from the sandy Georgia coast under the action of ocean storms, and is carried or rolled southward across the entrance to Cumberland Sound by the southerly coast or littoral currents, which are caused by the prevailing notheast winds of that locality. When those sand-laden currents are met by the great volume of water flowing out of Cumberland Sound on the ebb tide, the velocity of the water is checked, and the sand is thrown down to the bottom, thus forming a bar. The sand which continually pushes down from the north encroaches on the ship channel across the bar, and crowds it farther and farther to the south, until that channel extends down almost parallel to the coast line of Amelia Island, and finally gets very shallow and difficult of navigation. A new channel at last breaks out across the bar to the northward, where the original channel first lay, and this in its turn is pushed by the sand to the south, just as its predecessor was, and those changes causing two perpetually shifting channels are continually taking place. At the same time, the bar is continually pushing seaward, thus increasing the distance across it.

The first project for improving the entrance to Cumberland

Sound was prepared by General Gilmore, of the Engineers, in 1876, who recommended the construction of two low jetties, one springing from Cumberland Island and the other from Amelia Island, and converging towards each other as they extend seaward, so as to permit the water flowing out of the sound to scour out a deep channel through the bar, and to prevent that channel from shifting to the south (An. R. C. E., 1876), General Gillmore revised his project in 1879, and proposed to build the jetties of log mattresses, covered with stone. Work was then begun under that project, but the log mattress did not prove satisfactory. (Rec., 8789-91.)

In 1888, Lieutenant Carter succeeded General Gillmore in charge of that work, and in 1889, Carter proposed to use nothing but oyster shells and stone in building the jetties; and in the contract of January 31, 1889, awarded by the Chief of Engineers through Carter, no mattresses at all were used. (N. Y. Ex. 108.)

Major Black, of the Engineers, however, had begun to construct and use brush-fascine mattresses at the mouth of the St. Johns river (Mayport, Florida), and those mattresses were very successful, hence in March, 1891, a Board of Engineers, which was appointed by the Chief of Engineers to consider the situation at Cumberland Sound, and consisting of Generals Abbot, Comstock, Gillespie and Houston of the U. S. Engineers, recommended the use of mattresses in the jetties at Cumberland Sound, and that Board proposed to extend the Gillmore jetties out across the bar, and to raise them, the distance between the outer ends of the jetties to be 3,900 feet. (An. R. C. E., 1891.)

Under the recommendations of the Board of 1891, and the orders of the Chief of Engineers, Carter asked for bids on brush-fascine mattresses in May, 1891, which was the first time such mattresses had ever been purchased in the Savannah District. (Rec., 8435.) Those mattresses collected the sand, and were so successful in forming a good foundation that they were also used under the contracts of September 16, 1892, and November 15, 1894, with equally good results.

E. R. Conant testifies as a government witness in this case that he was the local engineer in charge under Captain Carter at Cumberland Sound, and that the brush-fascine mattresses used there were very successful in collecting the sand and in forming a foundation. Conant testifies:

> "I have sunk mattresses there which, after being visited in 24 hours,—or hardly 24, in 48 hours,—would show in-

dications of being silted at that time. * * * Silting took place almost immediately after the mattress was put in place." (Rec., 1620.)

Conant further testifies that:

"the seven or eight courses of mattresses would give a vertical height of 7 or 8 feet, after the stone was placed upon it." (Rec., 1625.)

"The jetty was in good condition, there were no holes in the jetty; * * * at the time the jetty was completed it was in one continuous line without breaks." (Rec., 1626.)

Conant made a detailed examination of that work, long after it had been done, and in a written report, dated April 30, 1895, said:

"The mats are well sanded up, and all the work is in good condition." (Rec., 1617.)

At the time of Conant's report, in 1895, the north jetty had a foundation length of only 18,235 feet and the south jetty a foundation length of only about 10,062 feet; and, on account of insufficient funds, the jetties had not been brought up to the proper height; hence the effect on the bar had been practically nothing.

There were prospects in 1895 that funds sufficient to prosecute the work with vigor would be made available, so General Craighill, then Chief of Engineers, appointed a Board of Engineers to consider the entire situation at Cumberland Sound, and on December 18, 1895, that Board submitted a detailed project for completing the jetties, and that Board made detailed estimates of the cost of completing the improvement. The multiple brush-fascine mattress used by Carter in 1894 at Cumberland Sound (concerning which Conant testified), had been so successful, having completely covered with sand so as to form an excellent foundation, that the Board recommended the continuance of their use, their detailed estimate being as follows:

"425,000 square yards of brush mattresses @ $1 per square yard." (An. Rep. C. E., 1896, p. 1295.)

The total length of mattress work proposed being 6,500 feet, and the width being 100 feet, the estimate of 425,000 square yards was for 6 courses of such mattresses. (See Rec., 3006.)

Work was begun on that project under the contract of 1896 with Greene and Gaynor, and Carter began with 6-course mattresses, as recommended in the project of the Board. Car-

ter's assistant, Marion Twiggs, reported that the mattresses were filling with sand to the crest, saying in a report of April 8, 1897:

> "Mats are sanding to the crest—sand can be felt in the top course."

Carter then increased the mattresses to 8 courses, so as to get the height quickly, and Twiggs reported of those mattresses on June 10, 1897, as follows:

> "Examined mat work in north jetty; sand collected all through mat; no mattress work destroyed." (See Def. Ex. 121.)

The great problem before Carter was to extend and raise the jetties quickly. Such action could be accomplished only with brush mattresses, and as those mattresses were covering over with sand they could be used with safety. In the report of the Board of 1895, it was stated with regard to previous work:

> "The present condition of the improvement cannot be regarded as satisfactory; * * * the north jetty in no degree checks the natural encroachment of the sand advancing from north to south upon the channel across the bar." (An. Rep. C. E. 1896, p. 1289.)

So successful was Carter's action in quickly raising and extending the jetties that on June 15, 1897, he reported to the Chief of Engineers that it had resulted in causing the desired deep-water channel between the jetties to extend more than 3,000 feet out into the bar. Carter's exact words are as follows:

> "The erosion of this new channel began in 1895, following the extension of the north jetty, and has advanced so rapidly that the channel now extends more than 3,000 feet into the shoal, with a least width of more than 400 feet between the 12-foot curves. Depths of more than 3 fathoms are now found, where a sand shoal, bare at low water, existed a few years ago." (An. Rep. C. E. 1897, p. 1534.)

There was only a short stretch of shoal remaining between the deep water inside and outside of the bar, and Carter recommended the expenditure of $50,000 for dredging on that shoal, so as to aid the current in quickly cutting through the bar. (An. R. C. E., 1897.) That sum was appropriated, but just as work was to be begun, Carter was relieved from duty at Savannah, and the work came under the control of Captain C. E. Gillette. Gillette diverted the money from the

place for which it was appropriated, and used it to cut a hole in the south jetty, so that the water, instead of flowing out between the jetties, crossed the south jetty, and thus caused the newly developing channel to deteriorate. (Rec., 2221.) Gillette also refused to load the jetties with stone (they had been lightly loaded, so as to get them built as rapidly as possible), and then made charges that the work done under Carter was a fraud.

That the prices for brush mattress work done under the contract of 1896 were reasonable, see *References No.* 17.

That Carter had the right under the contract to put in the mattress work which he did, see *References No.* 10, etc., where Colonel Handbury, General Ludlow, Major Mahan, Colonel Marshall, Colonel Bixby, of the Engineers, and others, testify that Carter's action was right.

It is true that Major Black testified he understood the Board's report to contemplate only a thin foundation of mattresses, but on cross-examination, Black admitted he was mistaken. (See Rec., 703.)

That it was not only good engineering, but that it was Carter's duty to put in many courses of brush mattresses at Cumberland Sound, is shown by the testimony of George Y. Wisner, Director of the American Society of Civil Engineers, who built the great Eads jetties at the mouth of the Mississippi river, and by the testimony of General Craighill, Chief of Engineers.

Wisner testifies:

"Q. * * * I will ask from an engineering standpoint if the methods pursued by Captain Carter were good?

A. I think it was a very good policy.

Q. And that good policy consisted in what?

A. In getting the work in as rapidly as possible, by putting in a large amount of brush foundation." (Rec., 2617.)

"Q. Having in view the work to be accomplished here at Cumberland Sound and at Tybee Breakwater, would a thin mattress of brush be as valuable as a thicker one?

A. I know of no reason why a thin mattress should be used at all; it is useless.

Q. Please explain at length why?

A. For the simple reason that a thin mattress adds but very little to the height of jetty construction, and that a stone jetty can be built with the same safety, so

far as subsidence into the bottom is concerned, as when resting on a thin mattress construction?

Q. Then what advantage has a thick mattress?

A One of the principal reasons for using a mattress in such locations usually arises from inability to obtain material with sufficient rapidity to push the jetties forward rapidly enough, so that there will not be a scour in advance, or a pushing of the bar seaward.

Q. Explain why a scour in advance has its dangers?

A. With slow construction, it sometimes amounts to more than twice the depth of the water at the point where the jetty is to be constructed; that it to say, with water 4 or 5 feet deep, we might have to build in water 15 feet deep. In cases of that kind, where material cannot be obtained sufficiently rapidly to construct your work, it might be economy to put in brush which you knew would be eaten up by the teredo entirely." (Rec., 2613-14.)

General Craighill testifies:

"Q. In carrying out a project of that sort, presented by the Board at Cumberland Sound, with which I assume you are in a general way familiar—

A. Yes, I have been familiar with it for many years.

Q. In carrying out such a project, is there any benefit in pushing the work rapidly?

A. There always is, when you are attacking a sea bar, to push the work at the bar as rapidly as possible.

Q. And the problem is to attack that bar, and get past it?

A. To get at the bar, and then the bar will disappear, if the project is a proper one.

Q. That is, if you get the end of your jetties, under a proper project, across the bar to deep water, then you have—

A. You have accomplished your object.

Q. Met your adversary, and he is yours?

A. Yes. That was very fully illustrated by the experience at the mouth of the Mississippi river, which was not conducted by an engineer officer, but by Captain Eads, who became so distinguished. The engineer officers had for years been making efforts, under the intermittent and insufficient appropriations of Congress, to remove the bar at the mouth of the Mississippi river. Captain Eads made a contract with Congress itself, in which he had

money abundantly, and the jetties were pushed as rapidly as possible, and attacked the bar, and it was removed. And that is the proper way to attack any ocean bar,—to get at it as soon as possible.

Q. Let us assume this state of affairs with respect to that bar?

A. You mean the Cumberland Sound bar?

Q. Yes, sir. Assume that the railroad and other facilities are such that stone cannot be delivered in greater quantities than 10 to 15 car loads a day, perhaps less; assume that brush can be obtained in sufficient quantities to push the construction of the jetty as the rate of, say, 50 feet a day, 10 feet high; assume that by such construction the bar can be caught and passed; assume that afterwards the supply of stone can be furnished sufficient to build up the jetty upon the foundation so laid, and keep it at a proper height; and assume that ultimately the entire brush work shall have gone to destruction, but in the meantime you have been enabled to keep your jetty up to the proper height; I will ask you whether or not, in your opinion, it would be true engineering economy to use the brush and catch your bar, if you could not catch it with stone, or a thin brush mattress?

A. I am very averse to answering hypothetical questions; at the same time, I am perfectly willing to express a general opinion with reference to such a situation as you have described, Cumberland Sound for instance. The main thing, as I said before, when you are attacking a sea bar, is to get there just as soon as you can. If you have the best kind of materials, and they can be furnished cheaply to accomplish that object,—I would do it as soon as possible, *using whatever materials were at hand to accomplish it in the soonest possible time,* and within reasonable limits of cost. If stone could *not* be had,—if brush *could* be had, to be managed with a small quantity of stone, *I should use the brush, in order to get there as soon as possible;* and if it became necessary later to reinforce the works of that sort, I should certainly expect to do it, to maintain what had been gained.

Q. And the saving in that respect, as I understand the engineering problem, is two-fold: by this rapid construction it saves the increased cross-section of your jetty necessitated by reason of the scour in advance, and it

saves the necessity of increasing the length of the jetty as the bar pushes seaward; is that correct?

A. There is an objection, undoubtedly, which has been realized in more than one case in this country and elsewhere in approaching a bar very slowly, that the bar moves out in front of you, and it is necessary to prolong your jetties still more. That has been the trouble, I think in Charleston and elsewhere, and it is one to be avoided as far as possible.

Q. And then as to scour in advance, on a slow construction?

A. Yes, undoubtedly; that has taken place in more than one instance; and I recall in particular a case that was in charge of one of the members of the court—Major Stanton at Winyaw Bay—(I think Major Stanton was in charge at the time)—where it was very desirable to extend the work as rapidly as possible with a grillage, so to speak, or a mattress, to hold it, to prevent the scour. I have had the same experience in other places, too." (Rec., 3421-24.)

That the mattress work done under Carter was in good condition when Carter left, and that the injury to it was caused by the actions of Gillette, see (Rec., 2655).

That Gillette procured his employee, Bacon, to manufacture evidence against Carter's work by the aid of false charts, see (Rec., 4464).

The following is a copy of a part of the Annual Report of the Chief of Engineers for 1900, pp. 1956-1957.

"Appendix P—Report of Captain Gillette
Improvement of Cumberland Sound, Georgia and Florida
Condition of work June 30, 1899

On the above date, the sailing line crossed the south jetty, a sailing gap having been made by removing a portion of the jetty."

The following is a copy of a part of the Annual Report of the Chief of Engineers for 1902, p. 1197.

"Appendix O—Report of Captain Gillette
Improvement of Cumberland Sound, Georgia and Florida
Operations during the fiscal year ending June 30, 1902

The order by which the work was carried out was with a view to causing the incipient north channel, between the jetties, to open, and at the same time allow the large sand bar between the jetties to be carried seaward.

* * * By this means, the north channel increased in depth until, on May 20, 1902, it had a greater depth than the temporary channel across the south jetty, and the buoys were removed to the new channel on May 28, 1902, since which date it has been entirely used by shipping, and the closing of the gap in the south jetty is well under way."

On February 19, 1898, Gillette was testifying concerning the dredging he had done at Cumberland Sound, and stated that instead of dredging between the jetties to aid in developing the incipient channel, he had cut a hole in the south jetty, and had then dredged outside of the south jetty, and not between the jetties at all. Gillette states that the dredge he used:

"tried, through a mistake,—not my intention, but by telegraphing,—she tried to work between the jetties, * * * and with that kind of material it is senseless to dredge." (Rec., 2221.)

Gillette testified further:

"Q. You also did some dredging *across* the south jetty, didn't you?

A. Hardly dredging; I removed or deepened the crossing of the south jetty." (Rec., 2221.)

"Q. And none of that was done at the point specified in the jetties?

A. No, sir; it was *outside* of the jetties." (Rec., 2228.)

"Q. That, you did not consider necessary at all?

A. No, sir; not that within the jetty; I thought that was a waste of money." (Rec., 2228.)

In the year 1901, however, Gillette desired to make a success of the jetty which Carter had brought so near to completion in 1897, and he desired to open the channel between the jetties, so he reports to the Chief of Engineers:

"The existing channel *across* the line of the south jetty has been maintained, with a very small amount of dredging. The opening of the *new channel between the jetties* has been very much accelerated by the construction of the north jetty across the bar." (An. Rep. C. E. 1901, p. 1657.)

"The Government dredge *Winyaw Bay* was employed from March 31, 1902, to the close of the fiscal year, to insure against temporary shoaling at any part of the new channel. Previous to the change of buoys she removed

72,811 cubic yards from the channel, which amount has since that time been increased to 114,083 cubic yards." (An. Rep. C. E. 1902, p. 1197.)

"The U. S. dredge Cumberland was completed during the fiscal year and arrived at Fernandina on January 9, 1903. The *Cumberland* is a sea-going dredge, 200 feet long, 40 feet beam, and is fitted with two 18-inch centrifugal pumps. She began dredging *in the jetty channel* on January 16, 1903, and left, to be hauled out for repairs and to be coppered, on May 28, 1903. During this period 379,571 cubic yards of material was removed." (An. Rep. C. E. 1903, p. 1168.)

"This district was in charge of Capt. Cassius E. Gillette, Corps of Engineers, until April 28, 1903, and of Lieut. Col. James B. Quinn, Corps of Engineers, since that date." (An. Rep. C. E. 1903, p. 257.)

It is thus seen that when Gillette's object was to ruin Carter's work, Gillette was willing to testify on the witness stand with regard to Cumberland Sound, that "between the jetties," and "with that kind of material, it is senseless to dredge" (Rec., 2221), and Gillette then opened a hole in the south jetty, to draw off the water which was flowing out between Carter's jetties, and refused to protect those jetties, and ruined them as far as possible.

But when Gillette wanted to get credit for that work himself, he raised the north jetty, which work he says "very much accelerated" the "opening of the channel between the jetties" (An. Rep. C. E. 1901, p. 1657), and then to aid that opening, Gillette dredged between those jetties, and actually constructed a sea-going dredge for that purpose, and removed hundreds of thousands of yards of material from the very spot where he testified it is "senseless to dredge" when such dredging would have completed and made a success of Carter's work.

Tybee Breakwater.

Tybee Roads, which lies at the mouth of the Savannah river and northeast of Tybee Island, is the anchorage for deep-draft vessels calling at the port of Savannah.

The value of the shipping which anchored annually in Tybee Roads about 1894 was in the vicinity of $32,000,000, and as the Roads was exposed to the full force of the northeast storms (which are the principal destructive storms in that

locality), the damage to the shipping lying in Tybee Roads was very great.

To provide for the protection of that shipping, Congress in 1896 authorized the construction of a breakwater. As that breakwater was also intended to keep the shifting sand, which is continually drifting southward, from filling up the Roads (which would destroy the entrance to Savannah harbor), the name of the breakwater was known as the "Detached Extension of the Oyster Bed Training Wall," that training wall having been built eastward from an island known as the "Oyster Beds," under the big contract, for the purpose of protecting the channel across Tybee Knoll, which was the shoal ground lying between the Savannah River and Tybee Roads.

The proposed breakwater was to be detached from the training wall, so as to afford a passage for light-draft vessels between Savannah River and Calibogue Sound, this route forming part of the water passage along the coast which is known as the "Inside Route."

Between Calibogue Sound and Tybee Roads lay a shallow sand spit, which was not eroded by the currents either from the Savannah River or from Calibogue Sound, and that shoal sand spit was chosen as the location for the breakwater, so as to make sure that no erosion would take place along that structure, which might undermine its foundation. The breakwater was to consist of a foundation of brush mattresses, capped with stone, and was estimated to cost $992,500 for a length of 20,500 feet.

In 1896, Congress authorized an expenditure of $1,000,000, to be divided between the construction of that breakwater, the improvement of a steamboat channel between Savannah, Georgia, and Beaufort, S. C., and the maintenance of the depths already existing in Savannah harbor. That gave about $850,000 for the breakwater, so bids were asked for on a basis of the construction of 9,000 feet of that structure. (Rec., 719.)

The Chief of Engineers directed that the work should consist of a foundation of brush mattresses, with a superstructure of stone. The contract was let to Greene and Gaynor, as the lowest bidders for the work, in October, 1896, and work was at once begun.

In order to prevent a shifting of the shoal which was used as the location of the work, the foundation was quickly put in, and when Carter left Savannah in July, 1897, nothing but the

mattress foundation was in place, and those mattresses had been lightly loaded with stone. As the stormy season usually begins in August, it was imperative that the foundation should be covered with stone before that time.

When Gillette took charge of that work in July, 1897, instead of proceeding to cover the brush mattress foundation with stone, he stopped work on the breakwater, thus causing great injury to that unfinished work, and then proceeded to manufacture charges against Carter.

The reasons for using a brush mattress foundation at Tybee are similar to those for using such a foundation at Cumberland Sound, and need not be repeated here.

Messrs. Wisner, Ripley and Kastl, all members of the American Society of Civil Engineers, examined that breakwater in December, 1897, and they found Carter's work to be in good condition, save for the injury to it caused by Gillette's action in refusing to cover it with stone.

Those engineers also found that the charts which Gillette had prepared by his employee, Cooper, and which purported to show that Carter had done bad work, were false. For details, see *References* No. 19, and the original testimony which is referred to on those pages.

As the price for brush-fascine mattresses under that contract was 95c per square yard, which is the same as under the big contract, it will not be necessary to consider that matter.

In the following pages are given some extracts from the evidence relating to the work done under the 1896 contracts at Cumberland Sound and Tybee Roads.

E. R. Conant, a government witness, testifies that he was local engineer under Captain Carter at Cumberland Sound, and that the brush-fascine mattresses used there were very successful.

A. E. Kastl, member American Society of Civil Engineers, who built the great jetties at Tampico, Mexico, testifies:

"Q. Have you seen in your experience the so-called multiple mattresses? I mean by that a thick mattress?

A. Yes, sir; we used them quite extensively at the mouth of the Brazos River, that is, before we reached the crest of the bar.

Q. What advantage from an engineering standpoint did you see from the use of a multiple mattress, a thick mattress?

A. It gives you, when it is built into the jetty, it gives you a more compact jetty." (Rec., 2821.)

"Q. With respect to the rapidity of construction secured by using a thick or multiple mattress, what can you say as an engineer on that point?

A. In the improvement of a harbor, with a bar at the mouth of the pass or entrance to a river, the quicker the jetty can be constructed and the ends of it brought beyond the crest of the bar, the sooner the channel will be obtained and the cheaper the work can be constructed.

Q. Of what advantage, if any, as to the economy of material in the progress of the work itself?

A. Well, if the jetty or jetties can be rapidly constructed, the end of the jetty will be brought out beyond the crest of the bar—

Q. I mean now, looking to the ends of the jetty as it progresses what advantage do you derive from rapid building with respect to scour in front?

A. It will prevent scour in advance of the jetty, that is, it will prevent a great amount of scour in front of the jetty.

Q. Will that be an advantage?

A. Yes, sir; you will use less material." (Rec., 2823.)

GEORGE Y. WISNER testifies:

"Q. How are the conditions at Cumberland Sound for rapid work with stone?

A. Very poor.

Q. Why?

A. The difficulties there are from the shoal water through which some of the work has to be constructed. The barges cannot be got alongside the work except at high tide, and that is generally a dangerous proceeding to the construction of the trestle work, and they also lead to difficulties." (Rec., 2617.)

WISNER testified concerning the breakwater at Tybee Roads:

"Q. I will ask you what, in your opinion, as an engineer, is the effect of stopping work on this breakwater?

A. Very damaging.

Q. Why?

A. The work, in the shape in which it was at the time

we made our survey, was liable to damage from storms and from the action of the teredo.

Q. And what would prevent the damage by storms?

A. Nothing, except completing the breakwater, as originally contemplated in the project." (Rec., 2468.)

For the testimony of Wisner that the crest of the jetty at Cumberland Sound in January, 1897, was from 10 to 12 feet higher than Gillette's charts showed it, see (Rec., 2652-54).

For the testimony of Wisner that the true crest of the foundation of the breakwater at Tybee Roads was five feet higher than Gillette represented it, see (Rec., 2650). See also (Rec., 2647-48).

Quality of the Brush Used.

The only witnesses who testify that an improper quality of brush (such as palmetto stumps and leaves) was used by Greene and Gaynor in their fascines are E. B. Parker, Phillip Hopper, Frank DuBose, and O. C. Darling; and those witnesses testify only concerning the work done at Cumberland Sound under the contract of 1896. No witness testified against the quality of the brush used under the big contract except A. J. Twiggs, who says that the fascines were "made of weeds with yellow flowers on them." (Rec., 11110.)

Parker testifies that he went to work making mattresses for Greene and Gaynor in "February or March, 1897." (Rec., 4438.) But Parker also testifies that he was never employed where any mattresses were ever built. (The witnesses, p. 69.)

DuBose testifies that he went to work for Greene and Gaynor the "latter part of July, 1897." (Rec., 4445.) This was after Carter had left, and was when Gillette was in charge.

Hopper testifies that he went to work for Greene and Gaynor "in March, 1897." (Rec., 4437.)

Darling testifies that he was never employed by Greene and Gaynor, but simply sold them some brush. *Darling* testifies:

"Q. Did you see them making any bundles of brush?

A. Yes. *I saw men working at it at a distance; but did not pay much attention to them.*" (Rec., 4448.)

The character of Darling's testimony may be estimated from the fact that he swears he saw a man pick up a "sixteen feet" fascine "with one finger" (Rec., 4449-50), al-

though another witness for the government, *P. E. Twiggs,* testifies that one man could not pick up a fascine, saying:

"A. It seemed too heavy. It would take two or three, and I have seen four men take hold of a fascine." (Rec., 483.)

E. R. Conant, another government witness, testifies of the fascines used at Cumberland Sound:

"A. *It did take two men to handle those fascines.*

Q. *Because of the weight of the fascines?

A. Yes, sir, because of the weight." (Rec., 1635.)

Marion Twiggs, a government witness, and the engineer who was in charge of the work done at Cumberland Sound, testifies:

"Q. Was the brush used in making the fascines, good live brush?

A. Generally it was." (Rec., 1161.)

*In a written report, dated July 31, 1897, which is (B. E. Ex. 15), *Twiggs* gives the kinds of live brush used at Cumberland Sound:

"Water oak, live oak, myrtle, cedar, hickory, gum, and some palmetto and pine."

E. R. Conant, a government witness, who was the engineer in charge at Cumberland Sound prior to Twiggs, was shown a bundle of brush which Gillette claimed to have found in an old abandoned camp of Greene and Gaynor, and in reply to a question by the court, *Conant* testified that the brush actually used by Greene and Gaynor

"was a much better class of brush than is shown here. There was a section of territory adjacent to the works, upon which a very good quality of brush grew, fairly straight, and easy to get into fascines; and during that contract, nearly all the material came from this one location." (Rec., 1621.)

A. S. Cooper, a witness for the government, who was the assistant engineer at Savannah during the big contract, testifies concerning the quality of brush used at Savannah, in a written report he made before charges were preferred against Carter, as follows:

"The material in the mat was good, and there was apparently plenty of it." (Rec., 1224.)

Cooper compared the character and amount of the brush

used in fascines under General Gillmore and under Carter, saying:

"A. *There was no change in the fascines, or bundles of brush." (Rec., 1219.)

"A. *There was not any great difference in them." (Rec., 1272.)

Campbell Ford testifies that at Augusta:

"A. *We found no difficulty in providing sufficient brush of good quality; good, fair straight brush." (Rec., 12946.)

P. E. Twiggs, a witness for the government, testifies that the brush around Savannah is even better than at Augusta, saying:

"A. I should say, in the low country around here, the quality of brush would be better than that in Augusta." (Rec., 1292.)

Elisha Winter, a witness of the government, testifies concerning the brush used at Savannah under the big contract:

"Q. What kind of brush did you cut?

A. Anything we could get,—pine, myrtle, sweet gum, and all other kinds, that grew in the woods, that wasn't too large." (Rec., 1803.)

The record shows that Elisha Winter is one of the 11 negroes who were brought by the government to testify that Greene and Gaynor had paid them low wages. After four of those witnesses had testified, and on cross-examination had admitted that the fascines were well made out of the kind of material required by the contract, and were well choked, etc. (Def. References, pp. 173-76), Gillette walked over to the other seven negroes, whispered to them, and they were dismissed without testifying, and the line of testimony was at once changed. (See C. M. 1030; 4631; 4866.)

Mr. Blair. "My opinion of the prosecuting witness (Gillette) was very much shaken. I saw him, and you saw him, when eleven colored witnesses were brought into this court room to testify as to the cost of making fascines. Four of them had been upon the stand. Under cross-examination they said the fascines were well made and tightly choked; and it did not suit this prosecuting witness, and he rose from his chair, and he went there, and he whispered to the other seven witnesses, and they left the room; and the line of prosecution was changed by bringing on some other witnesses." (C. M. 4631-32.)

COL. BARR. "I here state that I, and not Capt. Gillette, have decided what witnesses should be examined in this case; and that in the instance of the colored witnesses referred to by counsel, I decided not to put them on the stand." (C. M. 4866.)

W. G. Austin, a witness who had received from congress a medal of honor for distinguished gallantry under fire, and who inspected more than 200,000 square yards of the mattresses used under the big contract, was shown a bundle of brush which Gillette claimed to have found in the old abandoned camp of Greene and Gaynor, and *Austin* testified:

"Q. Did you ever see any such bundles go into any work in this district?

A. Never saw such a bundle as that on the work, unless it was probably half a dozen about such as that crept into the barge load of several hundred, and they were thrown out by the contractor himself. I discarded one or two of them, but the average of the brush that went in was probably from two to five hundred per cent. better than any bundle that was exhibited in the court room." (Rec., 3244.)

Major T. H. Rees, United States engineers, who inspected much of the fascine and mattress work under the big contract at Savannah, was shown the fascine which Gillette claimed came from an old abandoned camp of Greene and Gaynor, and *Major Rees* testified:

"Q. Did you ever see any fascines anything like that go into the work in this district?

A. No, I never did.

Q. In what respect do they differ from those you actually saw go into the work?

A. I never saw any old and dead brush go into the work, nor any that was of that appearance at all; I never saw any like that at all." (Rec., 2847.)

W. M. Connell, a foreman in charge of building fascines, testifies that the fascines were made "of small brush" (Rec., 3480); that the brush was "almost always tapering, being smaller at the tips." (Rec., 13029.) Connell testifies that when those fascines were made into mattresses:

"A We used to take five or six men, and get them to press against the barge and push them together with all the strength they had; and sometimes they would place a pry up against the barge, and have two men swing back

on that, and jam the brush as tightly together as they could get it." (Rec., 3483.)

C. C. Cole, a foreman in charge of building fascines, testifies that the fascines were always built of "green brush" (Rec., 3489); that they did not use everything, "some of it would be too large" (Rec., 3494); that they simply used "everything of a *brush* character." (Rec., 3494.)

W. J. Harris, a foreman in charge of building fascines, testifies concerning the brush which Gillette claimed came from an old abandoned camp of Greene and Gaynor:

"Q. Did you ever see any old ones, with dead brush like that on them, go into the works?

A. I never did." (Rec., 3486.)

To get suitable brush was so difficult that the contractors had to go long distances. *Thomas H. Laird,* master of vessels, testifies:

"Q. Do you know anything about how far the brush was brought down to be made into mattresses in this district?

A. Various distances; I can swear positively as far as 95 miles." (Rec., 3464.)

S. M. Hale, a witness for the government, testifies of the brush used at Savannah:

"A. There was nothing but oak and myrtle, and it was full of leaves." (Rec., 506.)

R. F. Ensey, the assistant engineer who built the first multiple mattresses used at Savannah, testifies that the fascines were made "of green brush." (Rec., 5307.)

Campbell Ford, a civil engineer who was an inspector on the big contract at Savannah, testifies of the fascines used:

"A. They were good fascines." (Rec., 3145.)

Ford also testifies that the brush used was "good," and the fascines "were well choked." (Rec., 3145.)

The government contends that the fascines built by Twiggs at Augusta were splendid fascines, made of splendid brush, and *Ford,* who was government inspector over the work done by Twiggs at Augusta, as well as government inspector over the work done by Greene and Gaynor under the big contract, testifies:

"Q. Now, was all the brush which went into the Twiggs fascines larger than any of the brush in that new fascine?

A. No.

Q. And the difference in the character of the fascine was for what reason, for what cause?

A. Merely from the character of the brush that was up there and which would average straighter.

Q. Was the brush which went into the Twiggs fascine any more difficult to obtain and bind into a fascine than the brush such as you saw put into the fascines down here on the Cockspur Training Wall?

A. I imagine up there it was easier to procure than the class of brush that was here, and possibly even easier to handle too.

Q. Was it any more costly for Twiggs to build his fascines as he built them at Augusta, in your opinion, that it is, or was, for the Gaynors to build the fascines as you saw them built down here for the Cockspur Island Training Wall?

A. I imagine not." (Rec., 3153.)

The requirement of the contract as to the quality of brush to be used in the fascines is as follows:

"All fascines will be made of live brush, of cedar, water oak, myrtle, sweet gum, or any other variety of wood approved by the engineer officer in charge." (Ex. 78; Sec. 39.)

—20—

ENGINEER OFFICERS WHO TESTIFIED AGAINST CARTER.

For the testimony of Colonel Hains, see (Rec., 681). For the evidence that Hains was given Carter's place, after testifying against him, see (Wy. 3831).

For the testimony of Captain Black, see (Rec., 2534). For his testimony in Carter's favor, see (Rec., 693, 2564).

For the testimony of Captain Abbot, see (Rec., 2568). For his testimony in Carter's favor, see (Rec., 811).

For the testimony of Captain Gaillard, see (Rec., 7). For his testimony in Carter's favor, see (Rec., 725).

For the testimony of Captain Craighill, see (Rec., 2373).

For testimony of Colonel Gillespie and Major Adams, see (Rec., 2401; 2433).

For further details, see (Rec., 8154-61; 8325-28).

—21—

ENGINEER OFFICERS WHO TESTIFIED IN CARTER'S BEHALF.

The testimony of the engineer officers, who appeared on the witness stand in Carter's behalf, has already been largely quoted, or specifically referred to herein, under References 2, 3, 4, 5, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19, and need not be repeated here.

For further details, see (Rec., 8162-63).

—22—

CIVIL ENGINEERS WHO TESTIFIED IN CARTER'S BEHALF.

The testimony of the civil engineers, who appeared on the witness stand in Carter's behalf, has already been largely quoted, or specifically referred to herein, under References 2, 3, 4, 5, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 19, and need not be repeated here.

For further details, see (Rec., 8163-64).

—23—

CIVIL ENGINEERS WHO TESTIFIED AGAINST CARTER.

For the evidence that no civil engineer ever testified against Carter, except employes or contractors under Gillette, see (Rec., 8163).

—24—

CARTER'S DEPOSITS OF CURRENCY.

The source of all of the currency Carter ever had or used is shown on Defendant's Exhibits (Rec., 9549-9603), to which reference is made.

For evidence that Carter's wife died December 7, 1892, see (Rec., 5839). That she died childless, and that Carter was her heir, see (Rec., 5495-98).

For evidence showing that Carter went to New York to visit Westcott and his family, after the work for each month was settled up, and he had leisure, see (Rec., 5721-22).

For evidence that Westcott sent Carter a check for $489.86 to balance the estate of Carter's wife, see (Rec., 5470; 5518-23; 6646).

The testimony of Charles McPherson and Robert Nelson, ex-

pert accountants, with reference to Carter's deposits, and the estate of Carter's wife, as shown on Def. Ex. 96-A, will now be given.

CHARLES MCPHERSON, an expert accountant of Detroit, testifies:

"Q. (Mr. Stone.) I now call your attention especially to Defendants' Exhibits 96-A, being an account between R. F. Westcott and O. M. Carter, with regard to Carter's wife's estate, and I will ask you first if you made that account? I think you stated you did.

A. I did, yes, sir.

Q. I will ask you if all the memoranda upon which that account is based, except what had been introduced in evidence, was furnished to you before you commenced making up that account?

A. It was, yes, sir.

Q. Before commencing to make up that account, you were furnished were you not, with a copy of Carter's diaries?

A. Yes, sir.

Q. And you were furnished with other originals, or the copies of other memoranda referred to, as the basis of that account, were you not?

A. Yes, sir.

Q. Now, will you please go on in a general way and state how that account between Westcott and Carter with regard to Carter's wife's estate, how it was made up and what in a general way it means? You might commence at the first item and go along through.

A. The history of making it up would be rather a long history.

Q. I did not mean for you to give the history of making it up, I mean to go on and state whether in the first place it comprises all items or transactions between Carter and Westcott during the period which the account purports to cover?

A. It does comprise every item which I have been able to discover in the record between O. M. Carter and R. F. Westcott from December 29, 1892, to May 2, 1893.

Q. *Have you examined carefully to see whether there are any transactions between Carter and Westcott that are not included in that statement?*

A. *I have.*

Q. *Are there?*

A. *There are no other transactions shown by any evidence in the record.*

Q. As an expert accountant, it is usual in making up an account between two dates to include every item and transaction between the parties, is it not?

A. Yes, sir.

Q. And if all items are included and a final balance is struck which balances on both sides, does that to your mind, as an expert accountant, show that the account is complete and fully adjusted?

A. Yes, sir, the fact that all items are included and the account balanced would be a very strong indication that it is a correct statement of account.

Q. In this particular instance, is that very much strengthened by the fact that Robert F. Westcott's check to Carter for the balance of that account is made and given on May 2, 1893?

A. It is. It indicates to an accountant that that check was given in settlement of an account, and I think upon the stub it is stated that it is balanced to date or settled, I am not certain about that though.

Q. You found, therefore, did you, that commencing with December 29, 1892, and ending with May 2, 1893, that all of the transactions between Robert F. Westcott and O. M. Carter are included in that account, did you?

A. Yes, sir.

Q. And that on May 2, 1893, Mr. Westcott gave to Captain Carter a check which exactly balanced the difference between the debit and credit items in that account, did it not?

A. That is true.

Q. *Now, as an expert accountant, is not that practically conclusive evidence that Carter and Westcott had those transactions and settled them on that basis on May* 2, 1893?

A. *Yes, that is conclusive evidence; if you put into an account all of the items which are shown by evidence of transactions between the parties, and the account is finally balanced by check from one party to another by an odd amount, as in this case, it is conclusive evidence that the account is a correct statement of the transactions between those parties.*

Q. And the fact that the check is one of Westcott to

Carter's order would make it even more conclusive on Westcott than it would on Carter, would it not?

A. Yes.

Q. Showing Westcott thoroughly understood the transaction and had given his check for the balance?

A. It would show that Westcott himself determined the balance or approved of it, and drew his check in payment of it.

Q. Do you find by an examination of the transactions as stated in this exhibit, will you state whether or not Defendants' Exhibit 96-A is fairly consistent with every transaction shown by the record to have taken place between December 29, 1892, and May 2, 1893, inclusive?

A. Yes, it is not only consistent with it, it explains transactions which otherwise would need an explanation.

Q. After having examined the evidence and the other matters which you have stated, and after having considered the items embraced in this account between December 29, 1892, and May 2, 1893, and after having checked it over as you say you have with other transactions and found it consistent therewith, is there any doubt in your mind, as an expert accountant, that the transactions covered by Defendants' Exhibit 96-A actually took place as stated in that exhibit and were transactions as set forth in that exhibit?

* * * * *

A. *I should say that I am convinced that that is a correct statement of account.*" (Rec., 6620-39.) (See also Rec., 6739.)

Q. (Mr. Stone.) Now, I ask you to refer to Defendants' Exhibit 96-A, and also to Complainant's Exhibit 319, and state whether or not the $12,900 mentioned in Complainant's Exhibit 319 as having been deposited January 3, 1893, in the account of O. M. Carter came from Carter's wife's estate through Robert F. Westcott, or from other sources?

* * * * *

A. I will not attempt to state from my examination of the record from what source the money itself actually came, but R. F. Westcott treated it as a part of Carter's wife's estate in a later accounting with him.

Mr. Erwin: You mean you do not know where Westcott got the money?

The Witness: I don't know where Westcott got the money.

Q. (Mr. Stone.) Where did Carter get it?

A. Carter got it from Mr. Westcott." (Rec., 6639-40.)

"Q. (Mr. Stone.) I will call your attention to Complainant's Exhibit 319, under date of February 10, and 11, 1893, deposits in the account of O. M. Carter, $5,850, $5,000 and $5,000, and ask you whether or not that money came from Robert F. Westcott?

* * * * *

A. It did.

Q. I will call your attention to Complainant's Exhibit 319 under date of March 14, 1903, a deposit in the account of O. M. Carter of $7,000, and ask you whether or not that money came from Robert F. Westcott?

* * * * *

A. It did.

Q. I call your attention to Complainant's Exhibit 319, under dates of April 14 and 15, 1893, deposits in the account of O. M. Carter of $400, and $3,000, and ask you whether that money came from Robert F. Westcott?

* * * * *

A. I did." (Rec., 6642-43.)

"Q. (Mr. Stone.) In this statement of the account between Mr. Westcott and Captain Carter commencing December 29, 1892, and ending May 2, 1893, various transactions took place between Captain Carter and Mr. Westcott, and Mr. Westcott figured up these transactions and found that as the balance between them?

A. He owed Captain Carter $489.86.

Q. And on that day gave Captain Carter his personal check for that amount?

A. To balance the account." (Rec., 6646.)

"Q. Now, in making up this account which produces this check of Westcott's of $489.86, you had a good many transactions which you knew from the complainant's exhibits were actual transactions, didn't you?

A. Yes, sir.

Q. Now, we will go backwards on it. * * * The next item of $2,900 and the second item beyond it of $500, make $3,400, do they not?

A. They do.

Q. And the deposit by Carter of the two amounts amounting to $3,400 is proved by complainant's exhibit, isn't it?

A. Yes, sir." (Rec., 7365-66.)

"Q. This $7,500 of Westcott to Carter, $7,000 of it is proved by complainant's exhibit, isn't it?

A. Yes, sir.

Q. And the other $500 by testimony taken before the court martial, isn't it?

A. Yes, sir." (Rec., 7366.)

"Q. Now, the $16,500 on this Defendants' Exhibit 96-A, complainant claims that there was such an amount of $15,850, don't they?

A. Yes, sir.

Q. Which is very close to the amount. Now, the item of $12,900, that is shown to be an existing amount on complainant's exhibit, isn't it?

A. Yes, sir." (Rec., 7367-68.)

"Q. There is that one instance of a slight difference between the $16,500 and the $15,850 that complainant claims, but is only a difference in the amount, the existence of some such items is shown by complainant's exhibit, is it not, that is, that Carter got that amount of money somewhere?

A. Complainant's exhibits show certain deposits of $15,850; taking also the Savannah bank account it is shown there were deposits for more than that amount.

Q. Now, the $16,500 and the $350, balance of his wife's casket, is shown by this paper in the possession of the complainant, which is dated February 11, 1893, is it not?

A. Yes, sir.

Q. And that paper, according to Captain Carter's testimony, and according to the evidence in the case, has been in the possession of the Government from the time when it was seized in August or September, 1897, up to the present time?

A. That is true." (Rec., 7369-70.)

"Q. None of these matters that appear by complainant's exhibits could have been created by Carter at any time, could they?

A. They could not have been created by Carter.

Q. They were transactions which began and ended way back early in 1893, were they not?

A. Yes, sir." (Rec., 7370.)

"Q. The next item is $12,900, that is complainant's own statement of that amount, isn't it?

A. Yes, sir.

Q. That is to say that he deposited $12,900 on that day?

A. Yes, sir." (Rec., 7371.)

Q. The next item $16,500 is proved by this memorandum that has been in the possession of the Government, which was seized way back in 1897, isn't it? The one I refer to is on the back of the French poem of February 11, 1893?

A. Yes, sir, the amount of that $16,500, and the following item of $350, making altogether $16,850, was a matter of record and could not have been created." (Rec., 7372.)

"Q. The $7,500; $7,000 of that could not have been created by Carter, could it?

A. It could not have been.

Q. And the $500 was testified to before the court martial?

A. That is true.

Q. The next item of $500 and $2,900, the second item lower, amounting to $3,400, you have testified to?

A. Yes, sir.

Q. And the complainant's exhibits show that Carter deposited $3,400 at that time, don't they?

A. Yes, sir.

Q. So that could not have been created by Carter?

A. It could not have been." (Rec., 7372-3.)

"Q. Nor the check of Westcott to Carter of $489.86 could not have been created by Carter?

A. It could not." (Rec., 7374.)

"Q. * * * We find Westcott has actually paid Carter the balance of the account?

A. Yes, sir.

Q. That would show, would it not, that Westcott owed Carter the amount of $36,600 plus the amount of Westcott's check, $489.86, wouldn't it?

A. That would show that a proper debit of $36,600 against Westcott had been omitted from the account prior to the drawing of that check.

Q. And that it ought to be put in?

A. Yes, sir.

Q. *Now, then, taking all these other items which could not have been created by Carter, they necessarily produce that result of* $36,600, *do they not?*

A. *Yes, sir.*

Q. *And hence he could not have produced that balance of* $36,600, *because it already existed?*

A. *That is true.*

Q. What I mean is this, taking all these items in that

account from beginning to end, except the $36,600, and putting them where they appear to an expert accountant to belong, the result is that there would be a difference between the debit and credit items of $36,600, would there not?

A. Yes, sir.

Q. That difference could not be created by Carter now, could it; it existed years ago when these transactions took place, didn't it?

A. Yes, sir, it existed at some time in the account prior to the drawings of the balance check.

Q. The only thing that Carter could create in that account would be the giving of his statement *where that* $36,600 *came from,* wouldn't it?

A. That is the only item in the account which could possibly be created by Captain Carter; I do not know that I would know how, without the use of his testimony or some of the memoranda offered by him, to charge certain items in the account.

Q. I am speaking of the manner in which you distribute these items; you have distributed these items, have you not?

A. Yes, sir.

Q. As they appear to belong?

A. Yes, sir.

Q. And that produces a balance of $36,600, does it not?

A. Yes, sir.

Q. It produces a balance of a debit which would make Carter a debtor for $36,600, does it not?

A. That is true, yes.

Q. As a matter of fact, then, Westcott on May 2, 1893, instead of claiming Carter was a debtor, actually acknowledges that Carter was a creditor of his and pays him $489.96?

A. That is true, yes, sir." (Rec., 7375-77.)

"Q. * * * In January, 1893, it appears by Defendant's Exhibit 96-A and the documentary evidence from complainant's exhibits and so forth, as well as by Captain Carter's testimony, that Captain Carter received from Mr. Westcott, received certain money, does it not?

A. Yes, sir.

Q. $12,900?

A. Yes, sir." (Rec., 7637.)

"Q. There were other transactions, were there not, oc-

curring about that time between Westcott and Carter which were ultimately settled up on May 2, 1893, with his check to balance the account?

A. Yes, sir." (Rec., 7639.)

"Q. There is no evidence indicated in Exhibit 319 or any to which Mr. Johnson has referred, showing that Captain Carter ever received any more money during that period from anybody than what is covered in his settlements with Mr. Westcott, is there?

A. There is not.

Q. As a matter of fact, there is no pretense that Captain Carter ever received any other or any more money than is covered by this Defendant's Exhibit 96-A, except his army income?

A. That is true.

Q. *And hence, there is no evidence that he received during that period any money from Greene and Gaynor, because all that he did receive and all that they claim he received is shown by Defendant's Exhibit 96-A to have been received from Robert F. Westcott?*

A. *Yes, sir."* (Rec., 7639.)

"Q. Now, this Defendant's Exhibit 96-A that we have been over so many times, shows, does it not, that May 2, 1893, Carter and Westcott settled up all their transactions, and that Westcott made out a statement of it himself, because Carter was absent, and that Westcott on that date drew a check in Carter's favor for the balance?

A. Yes, sir." (Rec., 7646.)

"Q. We have already seen that Carter was not in New York at the time, and hence he could not have suggested anything to Westcott which would have caused Westcott to make a mistake in the drawing of that check?

A. That is true.

Q. The account then on May 2, 1893, between Westcott and Carter was closed by that check, was it not?

A. It was.

Q. And balanced completely?

A. Yes, sir.

Q. And that account was closed on the basis of Carter's wife's estate, was it not, and *not* on the basis of Westcott's having received a "divvy" from Greene and Gaynor on Carter's behalf?

A. Yes, sir.

Q. If, therefore, Westcott did receive any money from

Greene and Gaynor on Carter's behalf, he did not account for it in that settlement, did he?

A. He did not account for it as money received from Greene and Gaynor for Carter's behalf.

Q. Was it accounted for in that statement as money he received from Carter's wife's estate?

A. Yes, sir.

Q. And if he received any other money on Carter's behalf, he did not account for it?

A. He did not.

Q. That would go to show he did not receive any other money from any other source, unless it be assumed that Westcott defrauded Carter?

A. *It would go to show that he had not received any money from any other source for Captain Carter.*" (Rec., 7646-47.)

"Q. * * * *We find, do we not, that every item in this Defendant's Exhibit 96-A,* * * * *this account covering Carter's wife's estate, is taken from some of the complainant's exhibits, except the* $750 *on one side and* $400 *and* $350 *on the other side of the account, which Carter's memorandum shows was to pay for his wife's casket?*

A. *Yes, sir.*" (Rec., 7670.)

ROBERT NELSON, Vice-President and Manager of the International Audit Company of Chicago, testifies:

"Q. I now call your attention to Defendant's Exhibit 96-A, which is a statement of the transactions between Carter and Westcott, commencing immediately after the death of Carter's wife and ending on May 2, 1893, with a check by Robert F. Westcott for $489.86 to balance the account. * * *

A. * * *" (Rec., 7840.)

"Q. The next item, $12,900, is the amount of Carter's deposit with Van Deventer broker, on January 3, 1893, is it not, just look at—?

A. Yes sir, that is true.

Q. So that the amount of the item is not dependent upon Carter's testimony or memoranda?

A. It is not.

Q. If Carter deposited $12,900 on that date, he must have got it from some source?

A. Yes, sir.

Q. And the fact that he did deposit the amount on

that date would give rise to the inference there was some source from which he received it?

A. Yes, sir.

Q. Hence, it is proper to consider that fact in making up an account as an expert accountant?

A. Yes, sir.

Q. Take the next item, $16,500; the complainant claims that Carter deposited $15,850 on February 10th and 11th, does it not?

A. Yes, sir.

Q. Which is an amount very close to $16,500?

A. Yes, sir.

Q. Now, I call your attention to a memorandum made on the back of a French poem under date of February 11, 1893, made February 11, 1893, and which memorandum and poem have been in the possession of the Government from a time prior to the commencement of any difficulties in this case, and ask you if that does not show $16,500 as received by Carter from Westcott under date of February 10 or 11, 1893?

A. It does.

Q. So that that is not dependent upon any testimony or memoranda by Carter, except what has been in the possession of the Government from a time prior to the begining of this controversy?

A. That is true." (Rec., 7842.)

"Q. The next item is $7,500 under date of March 14, 1893, Carter deposited $7,000 that day, didn't he?

A. Yes, sir.

Q. So he must have got it from some source?

A. He must.

Q. And the testimony given before the court martial years ago was that he received $500 more than that, and that was given to his brother; that could not be dependent on any testimony of Carter now or any memoranda made in recent years, could it?

A. No, sir.

Q. The next item is $500, and following that the second item is $2,900, making a total of $3,400, is it not?

A. Yes, sir.

Q. It appears that Carter deposited $3,400, does it not? It appears that Carter deposited $3,400 April 14th and 15th, does it not?

A. Yes, sir, acording to Government Exhibit 319.

Q. This is the exact amount of those two items $500 and $2,900?

A. Yes, sir.

Q. If he deposited $3,400, he must have gotten it from some source?

A. Yes, sir.

Q. And hence the fact that he got $3,400 and deposited $3,400 is not dependent upon his testimony or any of his memoranda, is it?

A. No, sir." (Rec., 7844-45.)

"Q. The next item, check of Robert F. Westcott for $489.86, this is not dependent on either Carter's testimony or memoranda is it?

A. No, sir.

Q. If you had all these items before you as an expert accountant, and you found this check of Westcott's for $498.86, of May 2, 1893, which was apparently a check to balance, it would be your duty and aim, would it not, to put these items on the debit and credit side of the account till you had struck the balance which was represented by that check for $489.86, would it not?

A. Yes, sir, to make up the debit and credit account between the parties, you would have to do that.

Q. In order to do that, you would need some suggestions and information, would you not?

A. Yes, sir, if the statement was involved.

Q. *Would it make any difference about getting these suggestions or this information from Carter or anybody else, provided when you started to use the information you verified it?*

A. *If I found the information all right, I would not care what source I got it from.*

Q. *Would it make any difference whether the information was given you to-day or ten years ago?*

A. *No, sir.*

Q. Would it make any difference whether the information was given in a memorandum made ten years ago or to-day?

A. Well, if I were making up an involved account to-day and I got a memorandum that appeared to have been made recently, I would look upon it with more suspicion than I would upon one made years ago.

Q. But in either case you would not use the memorandum till you verified it, would you?

A. No, sir.

Q. So the difference between a memorandum made years ago and one made to-day, is that you would look at the one made to-day with more suspicion?

A. Yes, sir.

Q. And you would look at it with more careful scrutiny?

Q. Yes, sir.

Q. And then if you found it correct, whether it came from Carter or some other person, it would be equally reliable with one made ten years ago, would it not?

A. Yes, sir.

Q. Now complainant's counsel suggest that some of these memoranda here, which are found upon Carter's diary, might have been made by Carter in recent years, might have been made in recent months; would it make any practical difference to you in making up this account whether these memoranda were made recently or ten years ago, except if you thought they were made recently you would be more suspicious and more critical of them than if they were made ten years ago?

A. Yes, sir, that it right, that would be the only difference.

Q. Now, if you were seeking to balance a set of books and could not do it, and some man came along and looked over your shoulder, and said: 'Why don't you put that item on the debit and that item on the credit side?' And you found by doing so that that was the correct place for them, it would not make any difference, would it whether that man knew anything about the account or not, as to the suggestion?

A. No, sir.

Q. The one thing that you would do would be, immediately alter the suggestion was made, you would go to work and verify it, would you not?

A. Yes, sir, I would verify it before I would put it on the account.

Q. All these amounts here, then, in this account, except the first one of $36,600, we have been over, have we not?

A. Yes, sir.

Q. *And we find that there is no warrant for believing they could have been created by Carter recently, or created in recent years, have we not?*

A. *Yes, sir.*

Q. The only thing that we have not gone over is the first item of $36,600, is it not?

A. Yes, sir.

Q. If that item is left out of the account absolutely, it throws the account out of balance, does it not?

A. Yes, sir.

Q. And it would show that Carter owed Westcott a considerable amount of money, would it not?

Q. Yes, sir.

Q. Something like $36,000, or thereabouts?

A. Yes, sir.

Q. But Westcott's check made May 2, 1893, proved conclusively that he owed Carter, because he was paying money to him?

A. Yes, sir.

Q. Then do you say, when you come to put that check to Westcott's credit and put these other items where they appear to belong, it would leave a balance of $36,600, wouldn't it?

A. Yes, sir.

Q. That balance would not be created by Carter or by any memorandum by Carter at the present time; it would be a difference in the items deposited years ago, would it not?

A. Yes, sir.

Q. And hence the amount of $36,600 is the difference between those debit and credit items as the account existed years ago, so far as that account is concerned, is it not?

A. Yes, sir.

Q. The explanation that Westcott owed Carter $36,600 might have been given recently, might it not, but that would not affect the fact that he did owe him that amount, would it?

A. No, sir; the *information* might be given recently to me for balancing the account, but *the amount of the indebtedness existed years ago.*

Q. That is to say, that when Westcott gave his check of $489.86 to Carter, as the balance due under that settlement, instead of Carter owing him, he owed Carter?

A. Yes, sir.

Q. And if you put the check to his credit and checked the items al back, you find that the amount Westcott owed Carter was $36,600?

A. Yes, sir.

Q. *And that would not be dependent in the slightest degree on Carter's memoranda?*

A. *No, sir, it would depend on the balancing of this account.*

Q. Have you gone over this Defendant's Exhibit 96-A with a view of seeing whether there are any items that appear to be upon the wrong side or appear to be suspicious or open to any doubt?

A. I have.

Q. What is your opinion as an expert accountant upon the reliability of that account, Defendant's Exhibit 96-A?

* * * * *

A. *As an expert accountant examining this account, I should say that it is a true staement of the transactions between the parties between the 29th of December,* 1892, *and May* 2, 1893.

Q. In Defendants' Exhibit 96-A, to which I have just referred, it appears that the 10 Chicago & Northwestern bonds which were purchased in Carter's name were ultimately taken by Westcott and that he paid for the same?

A. That is true.

Q. I call your attention to Defendants' Exhibit 96-G, and ask you if that is a correct summary of Defendants' Exhibit 96-A?

A. Yes, sir, it is.

Q. In making up that Defendants' Exhibit 96-G, the $750 on one side and the $750 on the other side is left out, is it not?

A. It is.

Q. *That would make every item in Deefndants' Exhibit 96-G based, every amount of every other of these various other matters, upon Complainant's Exhibits, or upon documentary evidence that is undisputed, would it not?*

A. *Yes, sir.*

Q. If you had before you Defendants' Exhibit 96-G, or Defendants' Exhibit 96-A, and you found that they covered all the transactions between the parties, between December 29, 1892, and May 2, 1893, and that they balanced, and that there was no other way that that account could be balanced so as to bring out Westcott's check to balance, that $489.86, that would strengthen your opinion very much, would it not, as to the reliability of that Defendants' Exhibit 96-A and Defendants' Exhibit 96-G?

A. It would.

Q. Referring to Defendants' Exhibit 96-A in regard to which you have just testified, where did Carter get the $12,900 which he deposited on January 3, 1893, $3,550 of it with the Union Trust Company and $9,350 with C. H. Van Deventer?

A. He got it from the funds of the estate of Margaret W. Carter from R. W. Westcott.

Q. Where did he get the $15,850 which he deposited on February 10, and 11, 1893?

A. He got it from the same source.

Q. With that $15,850, he bought the 5 Chesapeake & Ohio and the 5 Wabash bonds, which are included in the receipt of October 29, 1897, did he not?

A. Yes, sir.

Q. These are the bonds which it appears by Defendants' Exhibit 96-F he paid to Westcott on May 10, 1897, as a part payment for the Orange real estate, did he not?

A. Yes, sir.

Q. So that that shows, does it not, where Carter got the money with which he bought the 10 M. bonds which he received from Westcott on October 29, 1897, and which he had traded to Westcott in the meantime for the Orange real estate?

A. Yes, sir.

Mr. Erwin: You mean that is what the Exhibit 96-A states about it? That is what you mean, isn't it, you mean that Defendants' Exhibit 96-A states that?

The Witness: Yes, Defendants' Exhibit 96-A states that, and I believe it to be correct, as I testified before.

Q. On the basis of this Defendants' Exhibit 96-A, which you state is corect, where did Carter get the $7,000 which he deposited on March 14, 1893?

A. From the same funds as the other funds, from R. F. Westcott, out of the estate of Margaret W. Carter.

Q. Where did he get the $400 and the $3,000 which he deposited on April 14 and 15, 1893?

A. He got that from R. F. Westcott also; he got $2,900 from R. F. Westcott from the estate of Margaret W. Carter, and he got $500 from R. F. Westcott.

Q. Also a part of the estate of Margaret W. Carter, was it not?

A. Yes, sir.

Q. With that money he paid part or all of the pur-

chase price of those 5 C., St. P., M. & O. bonds, did he not, that are on the receipt of October 29, 1897, the other 5?

A. Yes, sir.

Q. These bonds were also traded by him according to Defendants' Exhibit 96-F to Robert F. Westcott on May 10, 1897, as part payment for the Orange real estate, were they not? There was 10 Omaha bonds, were there not, of which these 5 were part?

A. Yes, sir.

Q. This is all the money which complainant refers to on these exhibits between January 1, 1893, and May 2, 1893, as having been deposited by Carter as money which came from Carter's wife's estate, through Westcot's is it not?

A. Yes, sir.

Q. That brings us up to May 2, 1893, does it not?

A. It does." (Rec., 7846-54.)

After McPherson and Nelson had thus testified the complainant offered no evidence to contradict their testimony.

For further details, see (Rec., 7095-96; 7118-7125; 7347; 7125-45).

As to the other deposits by Carter, which are challenged, a reference to Complainant's Exhibit 319 shows that the only ones listed on said exhibit are those stated in Defendant's Request No. 24. For the evidence showing where those small deposits came from, see Reference herein No. 33.

—25—

THE TRANSFER BY WESTCOTT TO CARTER IN OCTOBER, 1897.

On October 29, 1897, Robert F. Westcott gave to Oberlin M. Carter the share of Westcott's estate which Carter's wife (who was Westcott's daughter) would have inherited, had she lived, in pursuance of an agreement Westcott made with Carter, shortly after Carter's wife died in 1892. (Rec., 5722.)

Carter gave Westcott a written receipt for the securities, which written receipt has been found among Westcott's private papers and is now in evidence, and is admitted by both sides to be genuine. It is Complainant's Exhibit 272.

HENRY L. STIMSON, the law partner of Hon. Elihu Root, testifies he was present when that transfer was made by Westcott to Carter, and that Westcott took Carter's receipt for the

securities Westcott gave to Carter at that time. Stimson's testimony is as follows:

"Q. Were the securities turned over to Captain Carter that day?

A. Yes, the securities that were brought there by Mr. Westcott were, and which I understand were the ones indicated in that receipt. I have no reason to believe the receipt is inaccurate, only I do not want to be understood as having checked it myself. (Rec., 8882.)

Stimson further testifies that the receipt for the securities, and the agreement which vested in Carter the equitable title to the Orange property, were signed in his presence. His testimony is as follows:

"A. These papers were signed in my office, in my presence, and to the best of my recollection, on October 29, 1897." (Rec., 8882.)

The letter which Mr. Stimson, as Westcott's attorney, wrote to Mr. Rose, as Carter's attorney, in regard to the form of receipts, etc., which Carter should sign, is found at page 1378 of Wyman Record, and is as follows:

MEMORANDUM.

Elihu Root
George E. P. Howard
Bronson Winthrop
Henry L. Stimson

Law Office of
Root, Howard, Winthrop & Stimson
Mutual Life Building, No. 32
Liberty Street
New York.

MY DEAR MR. ROSE.

I enclose draft of memorandum. The proposed receipts are so long that they will not be finished until later but are in same form as the last one.

Yours truly.

H. L. STIMSON.

Oct. 29, 1897.
(Def. Ex. 107.)

OBERLIN M. CARTER testifies concerning that transfer as follows:

"Mr. Westcott told me shortly before October 29th that he was going to Europe, that he was old and might die there, and desired to carry out the agreement he made with me shortly after my wife's death, namely, that if I would remain with him and not marry again, that he would give me what would have been my wife's share of his estate; and then he said that he thought Dr. Solley was

not particularly fond of me because he was jealous of Mr. Westcott's preference for me over him; and that as Mr. Stimson was Dr. Solley's friend, he advised me to hire a lawyer of my own, so that his attorney and my attorney should confer together and make an arrangement so as to transfer the moneys he intended to give me as the share my wife would have had, so it would be legal, and so that in the event of his death the Solleys could not take it away, and I hired Mr. Rose; and Mr. Stimson and Mr. Rose corresponded, and then they got together and drafted between them this agreement which revested in me the equitable title to the Orange property, and drew up the receipt under which Mr. Westcott was to make the present of securities to me; and I went over to Mr. Root's office, and in the presence of Mr. Westcott, Mr. Stimson and Mr. Rose I saw the papers and checked them over, the securities as given in that receipt, and I signed the receipt.

Q. On October 29, 1897?

A. On October 29. 1897." (Rec., 6278-79.)

Carter was then on trial before the Board of Engineers. (Rec., 5708.)

That Westcott knew all about it, see the testimony of Mr. Rose. (Rec., 4694-99.)

The bill of complaint, page 48, says Carter's trial was "given publicity in the newspapers," and no one will pretend Westcott, Root, Stimson or Rose was ignorant of it.

For evidence that Carter devoted himself to Westcott so faithfully that Westcott never left Carter without putting his arms around Carter's neck and kissing him, see (Rec., 5712).

That Carter had every reason to believe the property, etc., Westcott gave to him was no more than his wife's share of her father's estate is shown by the fact that Westcott was a very wealthy man, and had already given large sums to his other heirs.

Westcott's personal attorney, Mr. E. Luther Hamilton, testifies that after Westcott had given to his only son his share of Westcott's estate, *i. e.*, "large sums of money, and had given him the business of the Westcott Express Company, out of which he has made a fortune;" and had given to his (Westcott's) wife "several hundred thousand dollars;" and had given what he had to Carter; the estate of Westcott in New York (not including property in New Jersey) was valued down to about $200,000, in order "to escape the transfer tax." Ham-

ilton testifies this value of the estate was "very much under the real value," and, as an example of this, Hamilton testifies:

> "There was one piece of property included in the inventory, assessed at about sixty thousand dollars, some stock, and our best information on the subject was that they were at least worth a hundred and twenty thousand dollars." (Rec., 4687.)

Hence, the value of Westcott's estate in New York, after the gifts to his son, to his wife, and to Carter, was at least $500,000.

Under Westcott's will, that sum would go to his two daughters, one of whom (Mrs. Conquest) had already received more than $70,000. (Rep. to B. E., p. 3.)

The face value of bonds given to Carter in Root's office was $222,000, and of stocks, etc., $71,000 (not including the real estate in controversy); hence Carter probably received just about what his wife would have received out of her father's estate, had she lived. (Rec., 4686-88.)

E. Luther Hamilton, who was Westcott's confidential attorney for many years, testifies:

> "Q. Do you know whether prior to his death he"—referring to Mr. Westcott—"had conveyed to his wife or relatives, or other people, any considerable amount of property?
>
> A. I do.
>
> Q. Had he?
>
> A. He had.
>
> Q. To whom?
>
> A. To his wife." (Rec., 4686.)
>
> "Q. Do you know about the value of the property given to his wife?
>
> A. I should think several hundred thousand dollars." (Rec., 4686.)
>
> The Witness: "His son in that will was given a third of his estate; by a codicil executed several years afterwards, that gift to the son was revoked and he was given the sum of $100. The codicil stated, in substance, that the revocation was upon the ground that Mr. Westcott had given his son large sums of money and had given him the business of the Westcott Express Company out of which he had made a fortune." * * * (Rec., 4687.)
>
> The Witness: "On the trial of that action, the plaintiff took the concession of the defendant's counsel that *the*

estate was at least so much, and the plaintiff's counsel was indifferent whether it was more or less in accepting that concession.

Q. What was the general concession; the valuation?

A. My impression is two hundred thousand dollars." (Rec., 4685.)

The Witness: *"It was quite well, thoroughly believed, and almost known that the conceded value of the estate was very much under the real value, both as to personal and real. It was known that the personal property was undervalued voluntarily to escape the transfer tax, or reduce it to the lowest point."* (Rec., 4687.)

"Q. In your judgment, was the property that passed through the court as Robert F. Westcott's property at the valuation placed on it, anywhere near its real value, taking into consideration what he gave away before to his wife?

A. The counsel did not really think it was." (Rec., 4688.)

"Q. Mr. Westcott had a son to whom you refer whose name was Robert E. Westcott?

A. Yes, sir.

Q. Did they have any other children?

A. One only living, Mrs. Solley.

Q. Mrs. Dr. Solley?

A. Mrs. Dr. Solley.

Q. He also had another daughter, didn't he?

A. Yes; * * *

Q. That was Mrs. Conquest.

A. Mrs. Conquest." (Rec., 4688.)

Robert E. Westcott, the only son of Robert F. Westcott, testified in 1898:

"Q. Your father is a wealthy man, is he not?

A. Yes, sir." (Rec., 3290.)

"Q. Of what age is your father,

A. He is over seventy.

Q. And what is his condition of health?

A. He was in very bad condition when he left here." (Rec., 3290.)

Senator Chauncey M. Depew testified in 1898:

"Q. How long have you known Mr. Westcott?

A. About 30 years.

Q. What do you know, if anything, about his financial condition?

A. May I make an explanation?

Q. Yes, if you will?

A. Mr. Westcott is the originator or founder of the Westcott Express Company, and the New York Central Railroad had a contract with Mr. Westcott, who was the Westcott Express Company, for a great many years; I think, mainly for the handling of all the baggage of the New York Central Railroad. He had that contract, I think, almost from the consolidation of the road. He retired from the business some years ago, I do not know how many, on account of ill health?

Q. Do you know his whereabouts now?

A. I believe he is in Italy with a sick daughter.

Q. What do you know as to his wealth, whether he be a wealthy man or not?

A. I understood when he retired, that he retired a rich man. I have understood from him since, and conversations that I have had with him about his affairs, that he is a man of wealth." (Rec., 2406.)

For further details, see (Rec., 5713-14.)

On October 11, 1897, Robert F. Westcott took from Oberlin M. Carter certain property in Orange, New Jersey, which Carter had purchased from Westcott on May 10, 1897, and had paid for, principally, with the proceeds of his wife's estate. (Rec., 5723.)

Westcott gave Carter $63,000 for that Orange property, and Carter receipted to Westcott for that $63,000, which was the par value of the bonds with which Westcott made that payment. (Rec., 5676-79.)

That written receipt, by Carter to Westcott, has been found among Westcott's papers and is in evidence, and is admitted by both sides to be genuine. It is Complainant's Exhibit 269.

That transfer was made in the law office and in the presence of Mr. Thomas Thacher, a prominent attorney of New York, who was a partner of ex-Speaker Thomas B. Reed. (Rec., 5670.)

The defendant proved by Carter's testimony (which is uncontradicted) the entire details of this transfer. That testimony is found on pages (Rec., 5723; 7744; 7811; 6269; 6277). There is no evidence to the contrary.

When taking Carter's testimony the complainant's counsel was invited by Carter's counsel to call Mr. Thacher as a witness, if Carter's testimony was doubted. The complainant did not call Mr. Thacher.

That incident is as follows:

"Mr. Stone: Mr. Thacher is alive, you can call him very easily.

Mr. Erwin: We do not want him, we have proved our case. If you want him, call him. He was Mr. Westcott's lawyer. I now invite you to call him.

Mr. Erwin: You are the one to want him.

Mr. Stone: We don't want him, we have proved our case. You are simply putting your opinion against the evidence. *We could like nothing better than for you to call Mr. Thacher.*" (Rec., 6273.)

The deed Westcott gave to Carter for the Orange property, when Carter bought it from him in May, 1897, is Complainant's Exhibit 427.

The circumstances attendant upon that purchase, the taking back of the property by Westcott on October 11, 1897, and his final gift of it to Carter on October 29, 1897, and to be found in the record, pp. 5357; 6066; 6133, 5661-5673.

It will now be proper to take up the history of the bonds given by Westcott to Carter on October 11 and October 29, 1897, in the law offices of Thomas Thacher and of Root and Stimson, which bonds are the ones described in said receipts, and which bonds are the ones the complainant seeks to recover in these suits, on the ground that Westcott received them from Greene in September, 1897.

That history is given by Charles McPherson and Robert Nelson, expert accountants.

HISTORY OF THE BONDS IN COURT.

CHESAPEAKE & OHIO bonds, bought by Carter February 11th, 1893, with money returned to him by Westcott from the estate of Carter's wife	$ 5,000.00
WABASH bonds, bought by Carter February 13th, 1893, with money returned to him by Westcott from the estate of Carter's wife	5,000.00
C., ST. P., M. & O. bonds, bought by Carter April 11th, 1893, with money returned to him by Westcott from the estate of Carter's wife	5,000.00
C. & N. W. bonds, bought by Robert F. Westcott on April 14th, 1893	10,000.00
MORRIS & ESSEX bonds, bought by Robert F. Westcott April 28th, and May 1st, 1893	10,000.00
C., ST. P., M. & O. bonds, bought by Robert F. Westcott April 28th, 1893	5,000.00
CHI., MIL. & ST. P. bonds, bought by Robert F. Westcott May 18th, 1893	10,000.00
M., L. S. & W bonds, bought by Robert F. Westcott June 7th, 1893	10,000.00
LONG DOCK bonds, bought by Robert F. Westcott July 11th, 1893	30,000.00
DEL. & HUD. bonds, bought by Robert F. Westcott August 10th, 1893	10,000.00
N. J. JUNCTION bonds, bought by Robert F. Westcott September 11th, 1893	5,000.00

N. Y., L. & W. (6s) bonds, bought by Robert F. Westcott, September 18th, 1893	15,000.00
N. Y., L. & W. (6s) bonds, bought by Robert F. Westcott October 16th and 18th, 1893	10,000.00
L. S. & M. S. bonds, bought by Robert F. Westcott November 9th, 1893	5,000.00
M. & St. P. bonds, bought by Robert F. Westcott December 8th, 1893	10,000.00
L. S. & M. S. bonds, bought by Robert F. Westcott January 10th, 1894	10,000.00
N. Y. Central bonds, bought by Robert F. Westcott January 10th, 1894	5,000.00
L. S. & M. S. bonds, bought by Robert F. Westcott, February 6th, 1894	5,000.00
N. Y. Central bonds, bought by Robert F. Westcott February 6th, 15th and 16th, 1894	10,000.00
N. Y., L. & W. (5s) bonds, bought by Robert F. Westcott September 11th, 1894	20,000.00
United N. J. bonds, bought by Robert F Westcott September 11th, 1894	6,000.00
United N. J. bonds, bought by Robert F. Westcott October 9th, 1894	4,000.00
Joliet & Northern Ind. bonds, bought by Robert F. Westcott October 9th, 1894	5,000.00
Morris & Essex bonds, bought by Robert F. Westcott October 9th, 1894	3,000.00
U. S. bonds, bought by Robert F. Westcott October 9th, 1894	4,000.00
U. S. bonds, bought by Robert F. Westcott December 4th, 1894	12,000.00
United N. J. bonds, bought for Robert F. Westcott March 25th, 1895, and paid for by him	10,000.00
United N. J. bonds, bought for Robert F. Westcott on April 8th, 1895, and paid for by him	10,000.00
Del. & Hud. bonds, bought for Robert F. Westcott on April 8th, 1895, and paid for by him	5,000.00
N. Y., L. & W. (6s) bonds, bought for Robert F. Westcott on April 9th, 1895, and paid for by him	5,000.00
C. & N. W. bonds, bought for Robert F. Westcott on April 10th, 1895, and paid for by him	5,000.00
Long Dock bonds, bought on June 7th and 17th, 1895, for Robert F. Westcott, and paid for by him	20,000.00
U. S. bonds, bought December 22nd, 1896, by Robert F. Westcott, and paid for by him	1,000.00
	$285,000.00

The testimony of McPherson and Nelson is based on Westcott's checks, his bank account, his brokers' accounts, his deposit tickets and his bank book, all of which have been obtained and are now in evidence and are admitted by both sides to be genuine.

The testimony of McPherson and Nelson shows that instead of Westcott receiving those bonds from Greene, in September, 1897 (as now asserted by the complainant), most of them had been purchased by and belonged to Robert F. Westcott years before September, 1897.

CHARLES MCPHERSON testifies:

"Q. I now call your attention to the receipt given by Captain Carter on October 11, 1897, to Robert F. Westcott for bonds, and I first call your attention to the 13 U. S. 5's mentioned on that receipt. Who bought those bonds originally? I am referring you now to Mr. Johnson's Division 20, for his theory of it?

A. 12 of these were purchased by Reed & Flagg for Robert F. Westcott, December 4, 1894.

Q. How were they paid for?

A. They were, with other bonds there, paid for by $53,000 of currency deposited with Reed & Flagg by R. F. Westcott, and Westcott's check on the Union Trust Company for $775.

Q. Then, on October 11, 1897, Mr. Westcott must have known something about those bonds as far back as the date of his check, December 4, 1894, mustn't he?

A. Yes, sir.

Q. He bought and paid for the bonds, you say?

A. Yes, sir.

Q. And they were in his possession on October 11, 1897?

A. Yes, sir; they were.

Q. Is there anything in Exhibit 319, or in the evidence to which Mr. Johnson refers, indicating that those bonds were ever out of his possesion in the meantime?

A. There is not. There is evidence that some of the interest coupons were collected by Captain Carter.

Q. But they were charged against his allowance, were they not?

A. Yes, sir.

Q. I show you the original check of Robert F. Westcott dated December 4, 1894, admittedly in his own handwriting, to the order of Reed & Flagg, cashed by them, and ask you if that is the check referred to as being the one which he paid the balance of the purchase price on those U. S. bonds?

A. It is; yes, sir." (Rec., 7319-21.)

"Q. On * * * December 4, 1894, Robert F. Westcott deposited with Reed & Flagg currency amounting to $53,000, did he not?

A. He did, yes, sir.

Q. And on that same day he purchased through Reed & Flagg 45 U. S. coupon 5's, did he not?

A. He did, yes, sir.

Q. Carter was not in New York at that time, was he?

A. He was not.

Q. These bonds were paid for by the $53,000 and by Robert F. Westcott's personal check on his private bank account, were they not?

A. They were, yes, sir.

Q. I show you a check of Robert F. Westcott dated December 4, 1894, admittedly in his own handwriting to the order of Reed & Flagg for $775, drawn on his private bank account in the Union Trust Company, and ask you if that is the check with which he paid for the balance due on these bonds?

A. It is, yes, sir.

Q. Is there anything on Exhibit 319, or in any matters to which Mr. Johnson has referred in the testimony, to show that Carter ever accounted to Westcott for that $775 check?

A. There is not.

Q. Taking these things into consideration, the fact that Westcott deposited this currency with Reed & Flagg at a time Carter was not in New York, that he bought these bonds of Reed & Flagg at a time when Carter was not in New York, that he paid for these with his individual check upon his own private account, taking all these things to which you have referred into consideration, in making up this account as an expert accountant, whose bonds would you treat these as being on December 4, 1894, at the time they were purchased?

* * * * *

A. I would treat them as the bonds of Robert F. Westcott." (Rec., 7038-39.)

"Q. (Mr. Stone.) What about the 1 U. S. 5? You have spoken about 12, haven't you?

A. Yes, sir.

Q. What about the other one?

A. It, with 9 other bonds, was purchased by Reed & Flagg for Robert F. Westcott December 22, 1896; the purchase price for the 10 bonds amounting to $11,400 being paid by Robert F. Westcott's check to Reed & Flagg.

Q. I show you the check of Robert F. Westcott to the order of Reed & Flagg dated December 22, 1896, admittedly in the handwriting of Mr. Westcott, endorsed by Reed & Flagg, and ask you if that is the check for $11,400 which paid for those bonds?

A. It is; yes, sir.

Q. Mr. Westcott could not have been surprised in September or October, 1897, with regard to these bonds, could he, under those circumstances?

A. He could not have been.

Q. The next bonds listed on that receipt are 10 Milwaukee & St. Paul 8's; what about those?

A. They were purchased by C. H. Van Deventer for Robert F. Westcott, December 8, 1893.

Q. How were those bonds paid for?

A. They were purchased out of the proceeds of $16,000 which were deposited in the account of C. H. Van Deventer to the credit of R. F. Westcott, that being a continuing account in which there were a number of other transactions." (Rec., 7321-22.)

"Q. I show you the deposit ticket by Robert F. Westcott, admittedly in his own handwriting, dated December 29, 1893, and ask you if that is a deposit ticket for the check for $23,071.53, which exactly balanced Westcott's account with Van Deventer for the month of December, 1893?

A. It is; yes, sir.

Q. In that account, which this check balanced, Westcott bought these 10 Milwaukee & St. Paul bonds, did he not?

A. He did; yes, sir.

Q. As a part of his account with Van Deventer?

A. Yes, sir.

Q. In view of the fact that his check for the balance of his account for December, 1893, was deposited by Westcott himself, it is apparent, is it not, that Westcott personally knew about that account?

A. It is.

Q. That being so, could Mr. Westcott be surprised with regard to those 10 Milwaukee & St. Paul bonds?

A. He could not have been surprised." (Rec., 7324.)

"Q. These bonds were bought on December 8th, these 10 Milwaukee bonds, on December 8, 1893; what is the history of the coupons off of these bonds?

A. The coupons which fell due in February, 1894, were collected by Robert F. Westcott through his account in the Union Trust Company.

Q. I will call your attention to a deposit slip admittedly in the handwriting of Robert F. Westcott whereby he

deposits in the Union Trust Company of New York, February 6, 1894, among other items, an item of $400, and ask you if that is the coupons off of these bonds?

A. It is.

Q. Did he deposit those coupons in his general account, among his other moneys, and check against the same as though it was his own?

A. He did." (Rec., 6875.)

"Q. These bonds were delivered by Robert F. Westcott to O. M. Carter on October 11, 1897, and a receipt taken for the same?

A. Yes, sir.

Q. Carter testifies, does he not, that these bonds were delivered by Westcott to him as part payment of the Orange real estate which Westcott that day repurchased from Carter, and which real estate Carter had some time before purchased from Westcott, paying therefor his wife's estate and some other matters?

A. Yes, sir.

Q. Now, taking all these things into consideration whose bonds would you say those were prior to the time on October 11, 1897, when Westcott delivered them to Carter in exchange for that Orange real estate?

* * * * *

A. I would say they were Robert F. Westcott's bonds; and in that connection I would call attention to the fact that with this same $16,000, a portion of it, there were purchased other bonds which the complainant does not claim were ever turned over to Captain Carter, or that the proceeds of them were ever turned over to Captain Carter.

Q. Please give us the details of that.

A. On December 1st, at the close of business December 1, 1893, Robert F. Westcott had a credit with C. H. Van Deventer of $4.03; on December 4th he deposited with Van Deventer currency to which attention has just been called under Division 13 of Complainant's Exhibit 319, amounting to $16,000; with that $16,000 Van Deventer on December 8th purchased the 10 M. Milwaukee & St. Paul bonds about which I have just testified and also 3 M. St. Louis & Alton bonds at $3,121.25, and on December 8th Van Deventer gave Westcott credit for $175 which he designated in his account as a check, leaving a balance due Westcott of $1,420.28, which shows that the St. Louis

& Alton bonds were purchased with the $16,000, but the complainant does not anywhere attempt to trace the St. Louis & Alton bonds into Captain Carter's possession or to trace the proceeds of those bonds into his possession.

Q. Isn't it true that the complainant in all of these exhibits has treated the St. Louis & Alton bonds as belonging to Robert F. Westcott?

A. It is true." (Rec., 6878-79.)

"Q. * * * I would like to ask you to look at Captain Carter's diary and see if he was in New York when Mr. Westcott bought these 10 Milwaukee & St. Paul bonds?

A. He was not in New York on that day or for several days before or afterwards.

Q. Mr. Westcott collected the coupons off these bonds in February, 1894, didn't he?

A. Yes, sir.

Q. At a time when Carter was in Savannah, didn't he collect them at that time, just look at Carter's diary and see?

A. Yes, sir; he collected the coupons at the time when Captain Carter was in Savannah.

Q. What date was that?

A. February 6, 1894.

Q. I show you the deposit slip of Robert F. Westcott in the Union Trust Company February 6, 1894, admittedly in his handwriting, and ask you if those coupons are embraced in that deposit?

A. They are, the item of $400 upon this deposit slip represents the coupons on those bonds.

Q. Did he use that money for his own general purposes out of that bank account?

A. He did; yes, sir.

Q. The next are 5 Joliet & Northern Indiana bonds, are they not?

A. Yes, sir.

Q. On this receipt?

A. Yes, sir.

Q. Who bought those bonds?

A. Those bonds were purchased by Robert F. Westcott through Reed & Flagg October 9, 1894.

Q. How were they paid for?

A. They were paid for by Robert F. Westcott's check on the Union Trust Company for $43,911.42 and $10 in cash deposited with Reed & Flagg by Robert F. Westcott

on the same day, that check covering the purchased price of these securities and other bonds purchased on the same day.

Q. I show you the check of Robert F. Westcott dated October 9, 1894, for $43,911.42 with the Union Trust Company to Reed & Flagg, admittedly in his own handwriting, endorsed by Reed & Flagg, and ask you if that is the check that paid for those bonds?

A. It is.

Q. Mr. Westcott deposited some coupons off these bonds in his own bank account January 21, 1895, when Carter was in Savannah, didn't he?

A. Yes, sir.

Q. I show you the deposit slip of Robert F. Westcott in the Union Trust Company, New York, dated January 21, 1895, admittedly in the handwriting of Robert F. Westcott, and ask you if the coupons referred to are embraced in that deposit slip?

A. They are; yes, sir.

Q. That money was deposited you say by Westcott as his own money, was it not?

A. Yes, sir." (Rec., 7324-26.)

"Q. Where was Carter when Westcott bought those bonds?

A. On the Canadian Pacific Railroad near Winnipeg.

Q. On October 9, 1894?

A. Yes, sir.

Q. Taking into consideration these facts and the undisputed fact that they were bought in Robert F. Westcott's name, through Reed & Flagg, to whom a check was given, who would you say purchased those bonds, Westcott or Carter?

A. I should say Robert F. Westcott purchased those bonds.

Q. This check is against the private bank account of Robert F. Westcott, is it not?

A. It is; yes, sir.

Q. Taking those things into consideration, whose bonds would you say those were in making up an account as an expert accountant, whose bonds would you consider these to be at the time they were purchased?

A. Robert F. Westcott's." (Rec., 7012.)

"Q. (Mr. Stone.) Captain Carter received five of these bonds, which were purchased by Robert F. Westcott on

October 9, 1894, from Robert F. Westcott, on October 11, 1897, did he not?

A. He received the five Joliet & Northern Indiana bonds from Robert F. Westcott October 11, 1897, yes, sir." (Rec., 7028.)

"Q. Captain Carter testifies that the 5 bonds received on October 11, 1897, were received by him in re-exchange of the Orange, New Jersey, property, which Westcott had traded to him on May 10, 1897, and which Westcott got back again on October 11, 1897?

A. Yes, sir.

Q. And he testifies that the remaining bonds mentioned here were received by him from Westcott October 29, 1897, as a gift from Robert F. Westcott?

A. Yes, sir.

Q. Now, then, independent of Carter's testimony on that subject, but taking into consideration all the facts you have stated in regard to these bonds and so forth, in making up an account as an expert accountant, whose bonds would you consider those to have been from the time Westcott purchased them himself on October 4, 1894, up to the time that he turned them over to Carter on October 11 and October 29, 1897?

A. I would consider that they belonged to Robert F. Westcott; and that opinion would be very much strengthened by the fact that by periodical accountings between Captain Carter and Robert F. Westcott after the purchase of the bonds, their proceeds were treated as the property of Robert F. Westcott." (Rec., 7028-29.)

"Q. The next bonds on this receipt of October 11, 1897, are 15 New York Central 7s?

A. Five of these bonds were purchased by C. H. Van Deventer for Robert F. Westcott January 10, 1894.

Q. How were they paid for? Look on Van Deventer's account.

A. They are charged into the general account of Robert F. Westcott with Van Deventer, and that that account was balanced January 15, 1894, by Robert F. Westcott's check for $977 to C. H. Van Deventer." (Rec., 7326.)

"Q. I show you a check by Robert F. Westcott, dated January 15, 1894, on the Union Trust Company to the order of C. H. Van Deventer for $977, admittedly in the handwriting of Westcott, cashed by Van Deventer, and ask you if it is not a fact that on January 15, 1894,

Robert F. Westcott himself paid the balance of that account to Van Deventer by this check of $977?

A. It is; yes, sir.

Q. Taking that account of Van Deventer's into consideration and the other transactions, whose bonds were those New York Central bonds when they were then bought?

A. Robert F. Westcott's bonds.

Q. When he delivered those bonds to Carter on October 11, 1897, could he have been honestly surprised with regard to these bonds?

A. He could not have been.

Q. Now, there are 10 more New York Centrals included in the receipt of October 11, 1897, are there not?

A. Yes, sir; they were purchased by Van Deventer for Robert F. Westcott on February 6, 15, and 16, 1894.

Q. It appears from Van Deventer's account, does it not, that he and Westcott balanced their account at close of January, 1894?

A. Yes, sir.

Q. And that there was no debit or credit balance remaining?

A. That is true.

Q. In the account between Westcott and Van Deventer for February, 1894, there is * * * a debit to Westcott for 2 M. New York Central bonds?

A. A debit to Westcott for * * * 2 M. New York Central." (Rec., 7329-30.)

"Q. The next is a charge for his purchase of 6 New York Central bonds?

A. Yes, sir.

Q. The next is a charge for the purchase of 2 of the New York Centrals?

A. Yes, sir.

Q. That left the account between Westcott and Van Deventer in what condition?

A. It left a debit balance against Westcott of $43.65.

Q. How was that disposed of?

A. It was settled by a payment made by Westcott to Van Deventer with Westcott's check on the Union Trust Company March 5, 1894.

Q. For $43.65?

A. Yes, sir.

Q. I show you the check of Robert F. Westcott signed

by him to the order of C. H. Van Deventer for $43.65, the signature is admittedly in his handwriting, in fact this is all in his handwriting except the amount $43.65, which was filled in by Captain Carter under the circumstances mentioned in Captain Carter's testimony, namely, that Westcott was sick and asked Captain Carter to take this check to settle up Westcott's balance with Van Deventer, to which you refer?

A. It is; yes, sir.

Q. Taking those things into consideration, and especially the check here in Robert F. Westcott's handwriting, could Westcott have been honestly surprised October 11, 1897, with regard to these bonds?

A. He could not have been.

Q. You have already testified, have you not, that if you were making up an account as an expert accountant and took these things into consideration, you would consider these bonds as being Westcott's bonds?

A. Yes, sir.

Q. Is there anything in Exhibit 319, or in anything to which Mr. Johnson has referred indicating a change of ownership of these bonds between the time they were bought and October 11, 1897?

A. There is not." (Rec., 7331-32.)

"Q. Robert F. Westcott collected the coupons for these 15 New York Central bonds January 22, 1895, did he not, when Carter was in Savannah and deposited the amount thereof in his bank account in the Union Trust Company?

A. Yes, sir.

Q. I show you a deposit slip of Robert F. Westcott in the Union Trust Company, dated January 22, 1895, admittedly in his handwriting and ask you if that covers these coupons?

A. It does; yes, sir.

Q. Mr. Westcott could not have been very much surprised on October 11, 1897, with regard to these bonds, could he?

A. He could not have been." (Rec., 7329-33.)

"Q. The next bonds on this list are 20 Lake Shore 2nds; who purchased those bonds?

A. Five of them were purchased by C. H. Van Deventer for Robert F. Westcott November 9, 1893.

Q. Carter was in Savannah at that time, wasn't he, according to his diary?

A. Yes, sir.

Q. Westcott's account with Van Deventer was exactly balanced on November 3, 1893, was it not?

A. Yes, sir.

Q. What was the first transaction he had with Van Deventer after that time, shown by his account.

A. On November 8th Van Deventer credits him with a check of $100 and currency $6,000.

Q. The next?

A. On the 9th he charges him with the purchase price of the 5 M. Lake Shore & Michigan Southern bonds amounting to $6,181.25 and credits his account with a check of $81.25, which exactly balances the account." (Rec., 7332-33.)

"Q. And Westcott gave his personal check for the balance due upon those bonds amounting to $81.25, did he not?

A. He did; yes, sir." (Rec., 7334.)

"Q. (Continuing.) That check was cashed by Van Deventer. I will ask you if that is the check to which you refer for $81.25?

A. It is; yes, sir.

Q. Taking these things into consideration, could Mr. Westcott have been surprised in October, 1897, in regard to these bonds?

A. He could not have been." (Rec., 7336.)

"Q. I now ask you to give us the history of the coupons off these bonds?

A. * * * (Rec., 6837-38.)

Q. * * * They were deposited by Westcott with his broker, C. H. Van Deventer, and collected by Westcott in that way?

A. Yes, that is true.

Q. And the proceeds used by Westcott?

* * * * *

A. The proceeds were used by Van Deventer in a number of bond transactions—the proceeds were mingled by Van Deventer with the proceeds of a number of bonds which he sold for Westcott at that time, and which were finally turned over by Van Deventer to Westcott by checks drawn on December 29, 1893.

Q. There was no attempt on Mr. Westcott's part to keep the proceeds of these coupons or to keep them from belonging to anybody else, were they?

A. No, sir, there was not, and they were mingled with the proceeds of bonds which are admitted to have been the private bonds of Robert F. Westcott.

Q. In other words, Mr. Westcott deposited those coupons with his broker, just as he deposited any coupons with his broker, and they were mingled with other transactions with his broker exactly as though they belonged to him and apparently did belong to him?

A. That is true, yes, sir." (Rec., 6838-39.)

"Q. (Mr. Stone.) I call your attention to Defendant's Exhibit 98 and ask you if it is not a fact that in December, 1893, Westcott collected $1,125 worth of coupons altogether?

A. It is true.

Q. That $650 of those coupons came from bonds coming from Carter's wife's estate?

A. That is true.

Q. That $175 came from bonds in court, including those 5 Lake Shore, or being those 5 Lake Shore?

A. That is true.

Q. That $300 of these coupons came from bonds that are admittedly the private property of Robert F. Westcott?

A. That is true.

Q. That Westcott paid to Carter the $650 for the coupons coming from Carter's wife's bonds?

A. That is true, he did.

Q. And he kept the $175 from the 5 Lake Shores, and $300 from the bonds which were admittedly Westcott's?

A. That is true, he did.

Q. Then I will call your attention to Robert F. Westcott's personal check No. 207, December 4, 1893, and ask you if that check is not for $650?

A. Yes, sir, it is.

Q. And if that check does not immediately follow the collection by Westcott of the $650 coupons from Carter's wife's bonds?

A. It does, and he then states that the check is given in settlement of the balance due Carter.

Q. From these transactions of Westcott's as to what he calls bonds from Carter's wife's estate, coupons which are admittedly his own, and coupons of those 5 Lake Shore bonds, and from the fact that Westcott sends to Carter the proceeds of the coupons from the bonds com-

ing from Carter's wife's estate and keeps and uses the money from the coupons of these 5 Lake Shore bonds, whose bonds were these 5 Lake Shore bonds at that time, and whose coupons were they?

A. They were Robert F. Westcott's bonds and coupons." (Rec., 6841-42.)

"Q. There were more of these bonds included in the receipt of October 11, 1897, were there not?

A. Yes, sir; 10 of them were purchased January 10, 1894, by C. H. Van Deventer for Robert F. Westcott; they are all part of the transactions between Van Deventer and Westcott commencing January 2, 1894, and closing February 15, 1894, with Westcott's check for $977 to balance the account, concerning which I testified.

Q. That is the same check for $977, to which you have already referred?

A. Yes, sir.

Q. These Lake Shore bonds were bought in connection with the New York Central bonds, in regard to which you have already testified?

A. Yes, sir, * * * and then the remaining 5 of the 20 Lake Shore bonds which were delivered to Captain Carter October 11, 1897, were purchased by C. H. Van Deventer for Robert F. Westcott February 6, 1894.

Q. Is that the same time he made the purchase of the New York Central bonds you have already referred to?

A. Yes, sir; that is the same time he purchased a portion of the New York Central." (Rec., 7334-35.)

"Q. And the same final check which he gave to balance the account $43.65, is also?

A. Yes, sir.

Q. That makes the whole 20 Lake Shore bonds, does it not?

A. Yes, sir.

Q. Taking these things into consideration, could Mr. Westcott have been surprised in regard to these bonds of October 11, 1897?

A. He could not have been.

Q. Did Mr. Westcott ever collect any of the coupons off these bonds himself?

A. Yes, sir.

Q. I call your attention to a deposit slip of Robert F. Westcott in the Union Trust Company, of New York, dated June 1, 1894, admittedly in his own handwriting,

wherein certain deposits were made, and ask you if the interest coupons of those 20 Lake Shore bonds were then deposited by him?

A. They were; yes, sir.

Q. Deposited in his general account?

A. Yes, sir.

Q. And used as his own money?

A. Yes, sir." (Rec., 7335-36.)

"Q. Now, that completes the list of all the bonds received by Carter from Westcott on October 11, 1897, does it not?

A. I think it does; yes, sir.

Q. And you have before you, have you not, written evidence, admittedly in the handwriting of Robert F. Westcott, showing that Westcott could not have been surprised on October 11, 1897, or in September, 1897, with regard to these bonds, have you not?

A. I have.

Q. *It shows, does it not, that prior to October,* 1897, *in fact prior to the year* 1897, *that Mr. Westcott either gave checks to pay for these bonds, or collected off these bonds, or otherwise, handled all these bonds as his own?*

A. *Yes, sir.*

Q. *And that evidence with regard to each bond is in Westcott's own handwriting, is it not?*

A. *Yes, sir.*" (Rec., 7340.)

"Q. You have now gone over all the bonds covered by the receipt of October 11, 1897, have you not?

A. Yes, sir.

Q. Those bonds, according to Captain Carter's testimony, were paid to him by Westcott for the Orange real estate, were they not?

A. Yes, sir.

Q. And according to Captain Carter's testimony that Orange real estate was purchased by him in May, 1897, from Westcott, and $63,000 in bonds and money paid therefor?

A. Yes, sir.

Q. But both sides agree, do they not, in this case, that so far as it appears Carter did invest money in the Orange real estate?

A. Yes, sir.

Q. Now, if he invested money in the Orange real estate, the real estate belonged to him, didn't it?

A. The half interest; yes, sir.

Q. If the Orange real estate belonged to Carter by virtue of the transaction of May 10, 1897, to which he has testified, then when he turned it back to Westcott on October 11, 1897, and received bonds from Westcott, would he receive those bonds as Westcott's bonds, that is to say, would he receive these bonds on the theory that they were Westcott's bonds or on the theory they were not his bonds before he got them?

A. He would receive them on the theory they were Westcott's bonds delivered to him in exchange for the property.

Q. You mean he would not be receiving his own bonds in payment for his own property?

A. Yes, sir.

Q. The complainant in this case claims both the Orange property and the bonds as being subject to their suit, do they not?

A. Yes, sir.

Q. If Carter did own that Orange property, as he testifies, prior to October 11, 1897, and he turned it over to Westcott on October 11, 1897, and received this $63,000 bonds for it, which are embraced in that receipt, would you in making up an account consider that these bonds belonged to Carter before he received them on October 11, 1897, or would you consider they were Westcott's bonds?

A. I would consider they were Westcott's bonds till they were delivered Carter on October 11th in exchange for the Orange real estate.

Q. Have you ever in your experience as an expert accountant run across a case where a man knowingly received his own bonds in payment for property he conveyed or transferred?

A. I have not.

Q. That would be the situation in this case, would it not, if the Orange property belonged to Carter and he turned it over to Westcott in exchange for these bonds on October 11, 1897?

A. Yes, sir.

Q. I now call your attention to the receipt given by Carter October 29, 1897, to Robert F. Westcott for various bonds and so forth, and you find, do you not, that the first bonds mentioned on that receipt are 5 Chesapeake & Ohios?

A. Yes, sir.

Q. What is the history of those bonds?

A. They were purchased February 11, 1893, by Watson & Gibson for O. M. Carter.

Q. Captain Carter testifies they were purchased out of money coming from his wife's estate, does he not?

A. Yes, sir." (Rec., 7341-42.)

"Q. These are part of the bonds, are they not, which Carter paid to Westcott on May 10, 1897, towards the Orange real estate?

A. Yes, sir.

Q. According to Defendants' Exhibit 96-F.

A. Yes, sir.

Q. And we find that October 29, 1897, Westcott had possesion of those bonds, do we not?

A. We do; yes, sir.

Q. And that on that day he turned them over to Carter?

A. Yes, sir.

Q. Now, take the 15 Delaware & Hudson bonds on that receipt of October 29, 1897, and tell us their history.

A. 10 of those bonds were purchased August 10, 1893, from Reed & Flagg for Robert F. Westcott." (Rec., 7346.)

"Q. Taking these things all into consideration in regard to which you have testified, whose bonds were those 10 Delaware & Hudson bonds prior to the time that Mr. Westcott delivered them to Captain Carter on October 29, 1897?

* * * * *

A. They were Robert F. Westcott's bonds." (Rec., 6809-10.)

"Q. There are 5 more of those Delaware & Hudson bonds, are there not?

A. The other 5 Delaware & Hudson bonds were purchased through Reed & Flagg in the name of Robert F. Westcott April 8, 1895." (Rec., 7349.)

"Q. Now, what about the 5 Delaware & Hudson bonds?

A. The 5 Delaware & Hudson bonds purchased April 8, 1895, have the same history after their purchase as the 10 Delaware & Hudson bonds which were purchased August 10, 1893." (Rec., 7122.)

"Q. I think you have already stated that * * * the 5 Delaware & Hudson * * * , if you were fig-

uring up an account as an expert accountant, you would treat as the property of Robert F. Westcott, would you?

A. Yes, sir.

Q. Is there anything to change that situation from the time the bonds were purchased up to the time they were delivered by Westcott to Carter October 29, 1897?

A. There is no fact in the record sufficient to change that condition." (Rec., 7125.)

"Q. The fact that Carter collected the coupons and that he accounted for them and charged them against his allowance for 1896 and 1897 would overcome any possible presumption that might arise, would it not, if you were making up such an account, that the bonds belonged to Carter?

A. *Yes, sir, the fact that Captain Carter accounted to Westcott for the coupons collected by him would be the strongest indication that Captain Carter was not the owner of the bonds.*" (Rec., 7125-26.)

"Q. We find that on September 11, 1894, Westcott deposited the coupons from these bonds in his possession for his own use, the coupons on 10 of them?

A. The coupons on 10 of them; yes, sir.

Q. So we find that on September 11, 1894, Westcott had access to the coupons on 10 of these bonds?

A. Yes, sir.

Q. And that he deposited these coupons to his own credit, for his own benefit?

A. Yes, sir.

Q. We find the other 5 bonds were bought later on and probably paid for, bought with coupons on bonds which were purchased partly with checks which are admittedly in the handwriting of Robert F. Westcott?

A. Yes, sir.

Q. We find on October 29, 1897, however, all 15 in the possession of Robert F. Westcott?

A. Yes, sir.

Q. And we find on October 29, 1897, the coupons on the 15 bonds there in possession of Robert F. Westcott?

A. Yes, sir.

Q. Under such circumstances could Westcott honestly express any surprise with regard to those bonds?

A. He could not.

Q. Now, take the next 10 bonds on that list of those bonds received by Carter from Westcott October 29, 1897,

10 St. Paul, Minneapolis & Omaha bonds, usually called 'Omaha bonds,' when were they bought?

A. 5 of these obnds were purchased April 11, 1893, by C. H. Van Deventer in the name of O. M. Carter and the other 5 were purchased April 28, 1893, by C. H. Van Deventer in the name of Robert F. Westcott.

Q. The whole 10 M. of those bonds are treated in Defendants' Exhibit 96-A as belonging to Carter, are they not?

A. Yes, sir." (Rec., 735-52.)

"Q. * * * What became of these Omaha bonds?

A. The Omaha bonds were delivered to Carter by Westcott October 29, 1897, prior to that date they had been delivered by Captain Carter to Westcott in exchange for the Orange real estate.

Q. That was on May 10, 1897, wasn't it?

A. That was on May 10, 1897, yes, sir." (Rec., 7378.)

"Q. Now, these Omaha bonds were in Westcott's possession October 29th, were they not?

A. Yes, sir.

Q. And he turned them over to Carter on that date, didn't he?

A. Yes, sir.

Q. The history of those bonds then is briefly this, is it not, that they were bought in 1893, part by Carter and part by Westcott, and were treated between Carter and Westcott on May 2, 1893, as the property of Carter coming from his wife's estate; that Westcott knew all about the bonds, because he bought 5 of them and because he collected the coupons on them on two occasions, and that he gave a check which paid for the other 5 which on May 10, 1897, were included in the bonds that Carter paid to Westcott on account of the Orange real estate, and that at that time became the property of Robert F. Westcott, and on October 29, 1897, were found in the possession of Robert F. Westcott and he turns them over to Carter as part of the transaction of that date?

A. Yes, sir.

Q. What are the next bonds on this list?

A. 15 Chicago & Northwestern bonds.

Q. What is the history of these bonds?

A. 10 of these bonds were purchased by Van Deventer in the name of Captain Carter April 14, 1893.

Q. How much did they cost?

A. $13,612.50, plus an interest charge of 56 cents.

Q. What happened that same day at Van Deventer's, did he receive a check from Robert F. Westcott?

A. Yes, sir; on the same day.

Q. And the account was balanced?

A. The account was balanced by Westcott's check for $14,762.64.

Q. These bonds and the check are accounted for in that Defendants' Exhibit 96-A, are they not, in the statement of Carter's wife's estate?

A. Yes, sir.

Q. *In setting up Carter's wife's estate, did Westcott pay Carter* $175 *in coupons off of those Northwestern bonds as part payment of what he owed him?*

A. *He did; yes, sir.*

Q. *And the settlement of Carter's wife's estate, evidenced by Westcott's check of May* 2, 1893, *shows that Westcott took these bonds as his own, does it not?*

A. *It does; yes, sir.*

Q. I call your attention to Robert F. Westcott's deposit slip, in his own handwriting, dated February 6, 1894, and ask you if on that day he deposited the coupons off these Northwestern bonds in his own personal account with the Union Trust Company?

A. He did; yes, sir.

Q. And used the money for his own purposes?

A. Yes, sir.

Q. The deposit slip is in his own handwriting, is it?

A. It is.

Q. Carter was in Savannah at that time?

A. He was. On the same deposit slip are some items of rentals on his own individual property." (Rec., 7379-80.)

"Q. What is the subsequent history of those bonds, what became of them after they were thus bought by Carter from Van Deventer. What is the next step in their history?

A. They were exchanged by Carter to Westcott for other bonds and were treated by Westcott as belonging to himself, in the statement of account which was made on May 2, 1893.

Q. In that settlement of May 2, 1893, did Westcott charge Carter with the coupons off these bonds?

A. He did, yes, sir." (Rec., 6647-48.)

"Q. Were these ten Chicago & Northwestern bonds included in the receipt Captain Carter gave Mr. Westcott on October 29, 1897?

A. They were.

Q. Now, taking in view the original purchase of these bonds, the transactions of May 2, 1893, the transactions with regard to the coupons due August, 1893, the collection by Mr. Westcott of the coupons due on the various dates after that time, the charging of the coupons which Captain collected in 1896 against his allowance of that year, the undisputed fact that as shown by the evidence Captain Carter received these bonds from Robert F. Westcott October 29, 1897, and gave a written receipt for the same describing the bonds by number, the further undisputed fact that these bonds were received on that day by Captain Carter from Mr. Westcott in the presence of Mr. Westcott and Mr. Westcott's attorney, Captain Carter and Captain Carter's attorney, and the further fact as shown by the letter of Mr. Stimson to Captain Carter's attorney that correspondence took place between Mr. Stimson who was Captain Carter's attorney as to the receipts which were to be given for these bonds, and as to other matters, what, in your opinion as an expert accountant, to whom in your opinion as an expert accountant, did these particular bonds belong from May 2, 1893, up to the time that Captain Carter received them from Robert F. Westcott on October 29, 1897?

* * * * *

A. I do not care to express an opinion upon all of the facts stated in the question; but I will state my opinion from the accounts, which show that through a series of periodical settlements, the interest coupons from these bonds were treated as the property of Robert F. Westcott, and *not* the property of Oberlin M. Carter; and of course *the conclusion is inevitable that the bonds themselves were the property of Robert F. Westcott.*" (Rec., 6657-61.)

"Q. (Mr. Stone.) Don't you also base it on the fact that time after time Westcott collected these coupons himself in his own bank account and used the proceeds for his own use?

A. Yes, sir." (Rec., 6661-62.)

"Q. Before leaving these Chicago & Northwestern

bonds and coupons collected therefrom, I call your attention to Defendants' Exhibit 98, and I will ask you whether when Robert F. Westcott collected those Chicago & Northwestern coupons in November, 1893, he collected any other coupons at or about the same time, and, if so, what were they?

A. He did collect other coupons at or about the same time.

Q. What was the total that he collected, is it correctly stated in Defendant's Exhibit 98?

* * * * *

A. It is correctly stated in Exhibit 98, except as to the total "Kept and used by Westcott,' that should be $1,075; $600 and $475.

Q. (Mr. Stone.) A mistake in printing?

A. A mistake evidently in printing, right in the footing." (Rec., 6662.)

"Q. (Mr. Stone). Did you prepare Defendants' Exhibit 98?

A. I did not.

Q. Can you state what the item of $1,450, November, '93, is composed of?

A. I can.

Mr. Stone: I think we would perhaps save time and accomplish quicker results, if you will let me ask Captain Carter about all these bonds in Defendants' Exhibit 98, as he made up that statement and Mr. McPherson did not.

Mr. Erwin: No objection."

(The direct examination of Charles McPherson was thereupon suspended, and Oberlin M. Carter recalled for further examination upon behalf of the defendants, by Mr. Stone.)

OBERLIN M. CARTER, recalled for further examination on behalf of the defendants, by Mr. Stone, testified as follows:

"Q. Captain Carter give us a list of the coupons embraced in the item of November, 1893, $1,450, on Defendants' Exhibit 98?

A.

5	Chesapeake & Ohio	$ 125.00
5	Chicago & Eastern Illinois	125.00
5	Wabash	125.00
10	Chicago & Northwest	175.00
10	Milwaukee & Lake Shore	300.00
10	Wabash	250.00
10	Winona & St. Peter	350.00
	Making a total of	$1,450.00

Q. Please also describe the coupons in the item of May, 1894, $975?

A.

10	Wabash	$ 250.00
5	Chicago & Eastern Illinois	125.00
5	Chesapeake & Ohio	125.00
10	Chicago & Northwest	175.00
10	Milwaukee, Lake Shore & Western	300.00
	Making a total of	$ 975.00

Q. Give us a description of the coupons in the item of November, 1894, Defendant's Exhibit 98, of $1,412.50.

A.

10	Wabash	$ 250.00
5	Chicago & Eastern Illinois	125.00
5	Chesapeake & Ohio	125.00
10	Chicago & Northwest	175.00
10	Milwaukee, Lake Shore & Western	300.00
35	U. S. 5's	437.50
	Making a total of	$1,412.50

Q. Please give us a description of the coupons amounting to $600, which it is stated in that exhibit are admittedly from bonds of R. F. Westcott, under date of November, 1893.

A.

10	Wabash bonds	$ 250.00
10	Winona & St. Peter	350.00
	Making	$ 600.00

Mr. Stone: That is all."

CHARLES McPHERSON:

Direct Examination Resumed by Mr. Stone.

"Q. It appears, does it not, by Defendants' Exhibit 98 and the testimony that has just been given that in November, 1893, Mr. Westcott collected $1,450 of coupons altogether, $375 of which were from bonds from Mrs. Carter's estate, $475 from bonds in court, and $600 from bonds admittedly R. F. Westcott's, and that he paid to Carter the $375 from Mrs. Carter's bonds and kept and used the $475 from the bonds in court and the $600 from bonds admittedly R. F. Westcott's?

A. That is true.

Q. Would that strengthen your statement that those Northwestern bonds belonged to Mr. Westcott?

A. Yes, sir; it does.

Q. It appears that in May, 1894, he collected coupons amounting to $975, of which $375 were from Mrs. Carter's bonds, and $600 from bonds in court, and that he paid the $375 from the coupons from Mrs. Carter's bonds to Carter, and kept and used the $600 from the bonds in court, and that these Northwestern bonds were among the $600 of coupons which he collected from the bonds in court. Would that still further strengthen your statement that these Northwestern bonds belonged to R. F. Westcott?

A. It would. It would show that in the account he was treating them as belonging to him, or appropriating their income himself.

Q. If the same thing occurred again in November, 1894, would that still further strengthen that position?

A. It would for the same reason." (Rec., 6664-67.)

"Q. There were 5 more Northwestern bonds bought in April, 1895, were there not, when Westcott was in Europe and when Carter had power of attorney to act for him?

A. Yes, sir." (Rec., 7381.)

"Q. These 5 bonds were paid for out of Westcott's bank account?

A. Yes, sir.

Q. There is in evidence a written power of attorney authorizing Carter to buy bonds for him?

A. Yes, sir.

Q. These bonds were bought by Westcott, by Carter as his attorney?

A. Yes, sir.

Q. And the check drawn to pay for them was drawn on Westcott's bank account?

A. Yes, sir.

Q. And the bonds were found in Westcott's possession October 29, 1897?

A. Yes, sir." (Rec., 7382-83.)

"Q. I think you have already stated that * * * the 5 Chicago & Northwestern, if you were figuring up an account as an expert accountant, you would treat as the property of Robert F. Westott, would you?

A. Yes, sir.

Q. Is there anything to change that situation from the time the bonds were purchased up to the time they were delivered by Westcott to Carter October 29, 1897?

A. There is no fact in the record sufficient to change that condition." (Rec., 7125.)

"Q. Take the next item, 30 United New Jersey bonds, tell us about those.

A. 6 of those bonds were purchased by Reed & Flagg for Robert F. Westcott September 11, 1894.

Q. In connection with other bonds?

A. In connection with other bonds; yes, sir.

Q. How were they paid for?

A. They were paid for with currency and specie deposited with Reed & Flagg to the amount of $53,022.78.

Q. What about the remainder of them?

A. 4 of them were purchased October 9, 1894, by Reed & Flagg for Robert F. Westcott in connection with other bonds, and they were paid for by Robert F. Westcott's check on the Union Trust Company for $43,911.42 and currency $10.

Q. I will show you the check of Robert F. Westcott dated October 9, 1894, for $43,911.42, admittedly in his handwriting, cashed by Reed & Flagg, and ask you if that is the check that paid for those bonds?

A. It is; yes, sir.

Q. The complainant has produced Reed & Flagg's account, beginning September 11, 1894, have they not?

A. They have; yes, sir.

Q. That shows the purchase of these 6 M. United New Jerseys?

A. It does; yes, sir.

Q. And it shows on the same page the purchase of this 4 M. United New Jerseys?

A. Yes, sir.

Q. And these latter were paid for by Mr. Westcott's personal check?

A. Yes, sir.

Q. And this was all done in Mr. Westcott's account with Reed & Flagg?

A. Yes, sir; it was.

Q. What about the other United New Jersey bonds? You have now told us about 10, haven't you?

A. Yes, sir. 10 more were purchased March 25, 1895, by Reed & Flagg in the name of Robert F. Westcott for $11,126.67 and were paid for by check drawn against the account of Robert F. Westcott in the Union Trust Company for that amount, the check being drawn by O. M. Carter as attorney for Robert F. Westcott.

Q. What about the other bonds?

A. The other 10 were purchased by Reed & Flagg in the name of Robert F. Westcott, April 8, 1895, and were paid for, together with other bonds purchased on that date, by $17,327,08 of currency and specie deposited with Reed & Flagg and $900 of coupons on Long Dock bonds.

Q. The situation there is the same as it was on the other bonds you spoke of awhile ago.

A. On the Delaware & Hudson bonds?

Q. Yes, sir.

A. Yes, sir.

Q. Partly paid for with coupons, which Westcott had given his own personal check to help pay for?

A. Yes, sir." (Rec., 7383-84.)

"Q. (Mr. Stone.) These bonds were found in the possession of Westcott October 29, 1897?

A. Yes, sir. They were all delivered to Captain Carter by Robert F. Westcott October 29, 1897." (Rec., 7385.)

The Witness: "The 6 United New Jersey bonds were purchased by Reed & Flagg in the name of Robert F. Westcott and were paid for out of the $53,022.78 currency deposited with Reed & Flagg by Robert F. Westcott September 11, 1894.

Q. Before going any further, you say that they were bought in the name of Robert F. Westcott through Reed & Flagg?

A. Yes, sir.

Q. I call your attention to the fact that the deposit slip of September 11, 1894, in the Union Trust Company is in the handwriting of Robert F. Westcott and that there is no evidence as to who deposited the $53,022.78 with Reed & Flagg, excepting the fact that Westcott deposited $50,000 with the United Trust Company, and the further fact that Mr. Johnson claims that both items are part of the same transaction. In the absence of any testimony as to who deposited that money with Reed & Flagg, and in view of the fact that the money so deposited was a part of the same transaction as the $50,000 deposited by Westcott, who would you say made the deposit with Reed & Flagg?

* * * * *

A. Robert F. Westcott." (Rec., 6993-94.)

The Witness: "The 4 M. United New Jersey bonds were purchased through Reed & Flagg in the name of Robert F. Westcott October 9, 1894." (Rec., 7011.)

"Q. These were all purchased and paid for by a check of Robert F. Westcott, were they not, with the exception of a few of the bonds?

A. Yes, sir; with a check for $43,911.42, and $10 in currency.

Q. I show you this check, which is admittedly in the handwriting of Robert F. Westcott, it is dated October 9, 1894, is it not?

A. Yes, sir.

Q. And is for $43,911.42?

A. Yes, sir.

Q. And bears the endorsement of R. F. Westcott, does it not?

A. Yes, sir.

Mr. Stone: The check is admittedly the genuine check of Robert F. Westcott.

Q. Where was Carter when Westcott bought these bonds?

A. On the Canadian Pacific Railroad near Winnipeg.

Q. On October 9, 1894?

A. Yes, sir.

Q. Taking into consideration these facts and the undisputed fact that they were bought in Robert F. Westcott's name, through Reed & Flagg, to whom a check

was given, who would you say purchased those bonds, Westcott or Carter?

A. I should say Robert F. Westcott purchased those bonds.

Q. This check is against the private bank account of Robert F. Westcott, is it not?

A. It is; yes, sir.

Q. Taking those things into consideration, whose bonds would you say those were in making up an account as an expert accountant, whose bonds would you consider these to be at the time they were purchased?

A. Robert F. Westcott's." (Rec., 7011-12.)

The Witness: "The 4 M. United New Jersey bonds which were purchased through Reed & Flagg, October 9, 1894, have the same subsequent history as the 6 M. United New Jersey bonds which were purchased through Reed & Flagg September 11, 1894." (Rec., 7013.)

"Q. On March 25, 1895, Carter, as Westcott's attorney, bought through Reed & Flagg 10 M. United New Jerseys, did he not?

A. Yes, sir.

Q. For which the price was $11,126.67?

A. Yes, sir.

Q. And to pay for them Carter drew Westcott's check as his attorney on the Union Trust Company for that $11,126,67?

A. Yes, sir.

Q. Now, the check for $11,126.67 was charged against the balance then existing in Westcott's favor in the Union Trust Company?

A. Yes, sir." (Rec., 7093-94.)

"Q. You have already stated that the circumstances attending the purchase of those bonds would place those bonds in the account as belonging to Mr. Westcott, have you not?

A. They would; yes, sir." (Rec., 7107.)

"Q. Is it not a fact that on April 8, 1895, Carter deposited to the credit of Robert F. Westcott with Reed & Flagg currency $17,326 even and specie $1.08, making a total of $17,327.08?

A. It is true, yes, sir.

Q. On the same day he deposited the coupons off of what are known as the Long Dock bonds, did he not?

A. Yes, sir, amounting to $900.

Q. On the same day he bought for Mr. Westcott 10 M. United New Jersey bonds, the cost of which was $11,041.11, was it not?

A. The purchase price of the 10 M. bonds was $11,000 plus an interest charge of $41.44." (Rec., 7118.)

The Witness: "The history of the 10 United New Jersey bonds purchased through Reed & Flagg on April 8, 1895, is in all respects subsequent to the purchase, as the history of the 10 United New Jersey bonds purchased through Reed & Flagg on March 25, 1895." (Rec., 7121.)

"Q. I think you have already stated that all these bonds, the 10 United New Jerseys, * * * if you were figuring up an account as an expert accountant, you would treat as the property of Robert F. Westcott, would you?

A. Yes, sir.

Q. Is there anything to change that situation from the time the bonds were purchased up to the time they were delivered by Westcott to Carter October 29, 1897 ?

A. There is no fact in the record sufficient to change that condition." (Rec., 7125.)

"Q. Take the next, 10 Milwaukee, Lake Shore & Western bonds?

A. These were purchased by Van Deventer in the names of Robert F. Westcott June 7, 1893.

Q. This is the same account of Westcott with Van Deventer wherein you have stated heretofore the account was frequently balanced and Westcott either received or gave a check for the balance?

A. Yes, sir.

Q. It is the same account in which Westcott bought and sold various bonds which the complainant does not claim Carter had any interest in, is it not?

A. It is; yes, sir." (Rec., 7385-86.)

"Q. Now, please give us the history of those bonds, as to who purchased them or not?

A. The bonds were purchased June 7, 1893, by C. H. Van Deventer in the name of R. F. Westcott at a cost price of $12,262.50. They were delivered to Carter by Robert F. Westcott, October 29, 1897. Between the date of their purchase and the date of their delivery to Captain Carter. the coupons were collected in many instances by Robert F. Westcott, through his bank account, and in some instances, through the bank account of O. M. Carter; and in such instances as they were collected by Captain

O. M. Carter, they were charged against him in subsequent settlements made between him and Mr. Westcott." (Rec., 6782.)

"Q. I call your attention to these same Milwaukee, Lake Shore & Western bonds bought by Robert F. Westcott June 7, 1893, and ask you if it is not a fact that in November, 1893, Robert F. Westcott collected the coupons for those bonds at the same time he collected other coupons?

A. It is a fact.

Q. I will ask you to refer to Defendants' Exhibit 98 and state whether or not he collected in November, 1893, $1,450 in coupons, of which $375 were off of Mrs. Carter's bonds so-called, $475 off of the bonds in court which include these 10 M. Milwaukee, Lake Shore & Western and $600 from bonds admittedly R. F. Westcott's and not in controversy?

A. That is true.

Q. And if it is not also a fact that he divided this $1,450 into two parts, namely, $375 being the amount of the coupons off of Mrs. Carter's bonds and paid that amount to Carter?

A. He accounted to Carter for that amount.

Q. And that the other $1,075, namely, the coupons off these 10 Milwaukee, Lake Shore & Western bonds, and off of some other bonds in court and the $600 off bonds that were admittedly his, he appropriated and used for his own purposes?

A. That is true.

Q. I call your attention also to Defendants' Exhibit 98 for the month of May, 1894, and ask you if Mr. Westcott did not collect $975 off coupons at that time, $375 from Mrs. Carter's bonds and $600 from bonds in court, including the 10 Milwaukee, Lake Shore & Western bonds we have just talked about, is that correct?

A. That is correct.

Q. And did he not pay over to Carter, or account to him, for the $375 coupons off Mrs. Carter's bonds and keep the coupons off these 10 Milwaukee, Lake Shore & Western bonds and other bonds there?

A. That is true.

Q. I will ask you if in November, 1894, Westcott did not collect $1,412.50 worth of coupons, $375 from Mrs. Carter's coupons and $1,037.50 from the bonds in court?

A. That is true.

Q. And if he did not pay the $375 from Mrs. Carter's bonds over to Carter, and kept and used the $1,037.50 from bonds in court, including the coupons off from these same 10 Milwaukee, Lake Shore & Western bonds?

A. That is true.

Q. Taking all these things into consideration, in regard to which you have testified, whose bonds were those Milwaukee, Lake Shore & Western when they were bought by Westcott June 7, 1893?

A. Robert F. Westcott's bonds." (Rec., 6784-86.)

"Q. Now, the next bonds on that receipt of October 29, 1897, were 50 Long Dock bonds, tell us about those. You have already stated as to 30 of those bonds, have you not, that Westcott bought those bonds through Reed & Flagg July 11, 1893?

A. Yes, sir.

Q. And paid part of the price in currency, and gave his personal check for $2,000 as the balance of the purchase price?

A. That is true; yes, sir.

Q. And you have already seen and have before you that check of Westcott's which is admittedly a genuine check?

A. Yes, sir.

Q. Did Westcott collect the coupons on those 30 bonds on April 6, 1894? I show you the deposit slip of Robert F. Westcott in the Union Trust Company, dated April 6, 1894, admittedly in his own handwriting, wherein he deposited on that date, among other things, $900; and I will ask you if that is a deposit of those coupons from the 30 Long Dock bonds?

A. It is; yes, sir.

Q. Was it deposited in his general account?

A. It was.

Q. And used as his own money?

A. Yes, sir. On the same deposit slip is an item of $100, which it is not claimed was connected with the bonds and stocks in court.

Q. Did he collect the coupons off of these same bonds on November 22, 1894?

A. He did; yes, sir.

Q. You have already seen and testified with regard to the deposit slip for those coupons, have you not?

A. I have; yes, sir.

Q. And the same is admittedly in the handwriting of Robert F. Westcott?

A. Yes, sir.

Q. And the money that he deposited off these coupons November 22, 1894, was handled in his own personal account, was it not?

A. Yes, sir.

Q. And paid out by him as his own money?

A. Yes, sir.

Q. Carter was in Savannah at that time, wasn't he?

A. Yes, sir; he was.

Q. The other 20 Long Dock bonds were bought June 7 and 17, 1895, weren't they?

A. Yes, sir; bought through Reed & Flagg.

Q. In the name of Robert F. Westcott?

A. Yes, sir." (Rec., 7388-39.)

"Q. All those bonds, the 30 we have talked about, and the 20 we have just mentioned, were found in the possession of Robert F. Westcott October 29, 1897, were they not?

A. They were; yes, sir.

Q. And the coupons due on these bonds October, 1897, were found in Robert F. Westcott's possession on October 29, 1897, were they not?

A. Yes, sir.

Q. And both bonds and coupons were turned over to Carter on that day?

A. Yes, sir." (Rec., 7390.)

"Q. (Mr. Stone.) Taking all these things in regard to the 30 Long Docks into consideration, whose bonds were these from the time they were purchased by Robert F. Westcott, July 11, 1893, up to the time Carter receipted for them on October 20, 1897, so far as appears by the Exhibit 319 and by the evidence which Mr. Johnson says Exhibit 319 is based upon, and the matters that you have told about as to the collection of the coupons and payment for the bonds, and so forth? Whose bonds were they?

A. They were Robert F. Westcott's bonds. I do not believe you described in your question the particular fact upon which I base my opinion more than upon the other facts, although I do consider these other facts. *It appears that in the accountings made between Captain Car-*

ter and Robert F. Westcott, the coupons collected upon these bonds, were treated as the property of Robert F. Westcott, and upon that fact more than anything else I state they were his bonds.

Q. During what years were they so treated?

A. During the years 1896 and 1897, for the coupons collected during those years." (Rec., 6793-94.)

Q. On June 7, 1895, there was purchased through Reed & Flagg in the name of Robert F. Westcott 18 Long Dock bonds, were there not?

A. Yes, sir.

Q. And on June 17th, 2 Long Dock bonds?

A. Yes, sir." (Rec., 7137.)

"Q. Now, taking all these things into consideration which you have testified in regard to, these 18 Long Dock bonds, and the 2 Long Dock bonds, if you were making up an account as an expert accountant, whose bonds would you treat those as being at the time they were bought?

* * * * *

A. Robert F. Westcott's bonds.

Q. Whose bonds would you treat them as continuing to be till October 29, 1897?

A. Robert F. Westcott's bonds." (Rec., 7151.)

"Q. The next bonds on this list of October 29, 1897, are 30 New York, Lackawanna & Western, tell us about these?

A. 15 of them were purchased through Reed & Flagg September 18, 1893." (Rec., 7390.)

"Q. Mr. Westcott purchased on September 18, 1893, through Reed & Flagg, * * * 15 M. Lackawanna bonds, did he not?

A. He did, New York, Lackawanna & Western.

Q. Tell us about the coupons for those bonds, who collected the coupons due in January, 1894?

A. In January, 1894, the coupons on these bonds were collected by Robert F. Westcott through his account at the Union Trust Company.

Q. And the proceeds were used by him?

A. They were.

Q. What became of the coupons due in July, 1894? They were collected by Carter, were they not?

A. They were collected through the bank account of O. M. Carter.

Q. And charged against him in the account between him and Westcott that the defendant has produced here?

A. Charged against him as a part of his allowance for the year 1894." (Rec., 6819-20.)

"Q. I show you Robert F. Westcott's deposit slip in the Union Trust Company dated January 11, 1894, covering various items, and ask you if it embraces the coupons off these 15 Lackawanna bonds that we have just been talking about?

A. It does; yes, sir.

Q. He deposited those coupons in his own bank account, did he not?

A. Yes, sir.

Q. To his own credit?

A. Yes, sir.

Q. And he used the money for his own personal account, didn't he?

A. Yes, sir.

Q. The slip is admittedly in Mr. Westcott's own handwriting?

A. Yes, sir.

Q. I show you Robert F. Westcott's deposit slip in the Union Trust Company January 21, 1895, admittedly in his handwriting, and ask you if he did not again deposit those coupons on those 15 bonds to his own credit in his personal bank account?

A. Yes, sir; he did.

Q. And used the money for his own private purposes?

A. Yes, sir." (Rec., 7391-92.)

"Q. How about the coupons for January, 1897?

A. In January, 1897, the coupons were deposited in the account of R. F. Westcott in the Union Trust Company.

Q. And used by him for his own purposes?

A. Yes, sir.

Q. (Mr. Stone.) Mr. Erwin has suggested that these coupons were left there by Captain Carter or sent there by a letter; would the fact that Captain Carter sent those coupons to the Union Trust Company or left them there to Westcott's credit indicate that they were Carter's bonds or Westcott's bonds?

A. Indicate they were Westcott's bonds.

Q. And the fact that Westcott took credit for those bonds and did not account to Carter for them would still

further indicate that they were Westcott's bonds, would it not?

A. It would. At this particular time Captain Carter had a personal account of his own in the Union Trust Company, where there was also the account of Robert F. Westcott. If he had deposited them in his own bank account and not in that of Mr. Westcott, that would be an indication they were his bonds, but I treated that as between him and Mr. Westcott, the depositing of them in the account of Mr. Westcott, that it indicated they were the bonds of Mr. Westcott, and that he was the owner of the proceeds.

Q. And in no instance was he called upon to account for them in any deal between himself and Carter, isn't that true?

A. That is correct." (Rec., 6826-27.)

"Q. There were more of those New York, Lackawanna & Western bonds, weren't there?

A. Yes, sir.

Q. When were they bought and how?

A. Three of them were purchased in the name of Robert F. Westcott by Reed & Flagg October 16, 1893, and seven more were purchased in the same manner on October 18, 1893." (Rec., 7394.)

"Q. On October 16 and 18, 1893, Robert F. Westcott bought through his brokers, Reed & Flagg, 10 M. Lackawanna & Western bonds, paying $12,356.25 therefor; how did he pay for those bonds?

A. With the $11,000 of currency which he deposited with Reed & Flagg on October 10, 1893, plus the coupons on 30 Long Dock bonds amounting to $900, plus his own check on the Union Trust Company payable to the order of Reed & Flagg for $456.25.

Q. You have already stated, have you not, that these Long Docks belonged to Robert F. Westcott?

A. Yes, sir.

Q. Now, where a man buys $12,356.25 worth of bonds and gives his own personal check on his private bank account for $456.25 as a balance of the amount due on these bonds, whose bonds would they appear to be?

A. They would appear to be the bonds of the man in whose name they were purchased.

Q. And it is undisputed that Robert F. Westcott did in fact give his personal check on his private bank ac-

count for the $456.25 to pay for these bonds on October 18, 1893, whose bonds would you say these bonds were?

A. Robert F. Westcott's bonds." (Rec., 6832-33.)

The Witness: "The history of the coupons on these bonds is the same as the history of the coupons on the 15 M. New York, Lackawanna & Western, which were purchased through Reed & Flagg on September 18, 1893.

Q. You mean that Westcott bought 15 New York, Lackawanna & Western bonds on September 18, 1893, and 10 more on October 16 and 18, 1893, and that the history of the coupons for these bonds is the same on this last 10 M. as you have already stated with regard to the first 15 M., is that correct?

A. That is true; the two purchased together made 25 M., and the coupons were collected together in each instance after that.

Q. These bonds were also delivered by Robert F. Westcott to O. M. Carter on October 29, 1897, when Carter's receipt was taken for the same, were they not?

A. Yes, sir.

Q. Taking all these things into consideration, whose bonds were these from the time they were bought by Robert F. Westcott on October 16 and 18, 1893, up to the time he delivered these bonds to Carter and took his receipt on October 29, 1897?

* * * * *

A. Robert F. Westcott's bonds." (Rec., 6833-34.)

"Q. We have gone over how many of these Lackawanna bonds purchased in September?

A. We have gone over 25 purchased in September and October, 1893.

Q. Then there were 5 more, were there not?

A. Yes, sir.

Q. That were bought April 9, 1895, were there not?

A. Yes, sir.

Q. The coupons on those Lackawanna bonds bought in October have the same history as the ones you have already told about that were bought in September, have they not, with regard to Westcott's collecting the coupons January 11, 1894, and January 25, 1895, and depositing the money to his own account?

A. Yes, sir; the history of the 10 bonds purchased in October, 1893, is the same as the history of the 15 purchased in September, 1893.

Q. These 5 remaining Lackawanna bonds, to make up the 30, were purchased April 9, 1895, were they not?

A. Yes, sir.

Q. Through Reed & Flagg.

A. Yes, sir.

Q. In the name of Robert F. Westcott?

A. Yes, sir.

Q. And they were paid for by a check against Robert F. Westcott's bank account?

A. Yes, sir.

Q. Drawn by O. M. Carter as his attorney?

A. Yes, sir.

Q. Westcott was in Europe at that time?

A. He was.

Q. Before he left he gave Carter a written power of attorney to buy and sell bonds belonging to R. F. Westcott?

A. Yes, sir." (Rec., 7397-98.)

"Q. I think you have already stated that all these bonds, * * * the 5 New York, Lackawanna & Western, * * * If you were figuring up an account as an expert accountant, you would treat as the property of Robert F. Westcott, would you?

A. Yes, sir.

Q. Is there anything to change that situation from the time the bonds were purchased up to the time they were delivered by Westcott to Carter October 29, 1897?

A. There is no fact in the record sufficient to change that condition." (Rec., 7125.)

"Q. The next bonds on that receipt of October 29, 1897, were 5 New Jersey Junction bonds?

A. They were purchased September 11, 1893, by Reed & Flagg for Robert F. Westcott, and were a part of the transactions in the account with Reed & Flagg with Robert F. Westcott from September 6, 1893, to September 18, 1893, which included the 15 M. New York, Lackawanna & Western bonds purchased on September 18th, about which I have already testified.

Q. These bonds were also bought in the account of Robert F. Westcott with Reed & Flagg, were they not?

A. They were; yes, sir.

Q. In which account Westcott bought bonds and did business which was admittedly his own?

A. Yes, sir." (Rec., 7401-02.)

"Q. Now, taking all these things into consideration,

the fact that Robert F. Westcott deposited this currency, that he bought these bonds through his broker, these 5 New Jersey Junction bonds, that he collected the coupons due in February, 1894, and used the proceeds for his own benefit, and the other matters to which you have referred, whose bonds were those when they were bought September 11, 1893, and up to the time they were delivered to Carter by Westcott himself on October 29, 1897?

* * * * *

A. They were Robert F. Westcott's bonds." (Rec., 6818-19.)

"Q. The next bonds on this list of October 29, 1897, are 20 New York, Lackawanna & Western 5s, as distinguished from some Lackawanna 6s, which we have heretofore considered. When were those bonds bought?

A. Those were purchased September 11, 1894, by Reed & Flagg for Robert F. Westcott.

Q. They were paid for by currency deposited with Reed & Flagg, were they not, to Westcott's credit?

A. Yes, sir.

Q. There is no claim, that you have discovered, that Carter deposited that currency, is there?

A. There is not." (Rec., 7403.)

"Q. These same 20 Lackawanna bonds were found in Westcott's possession on October 29, 1897, were they not?

A. Yes, sir.

Q. And were part of the same bunch of bonds mentioned, of which you have testified with regard to heretofore?

A. Yes, sir." (Rec., 7407.)

"Q. Now, taking all these matters into consideration which you have testified to with regard to Mr. Westcott depositing the $50,000 on September 11, 1894, and the $53,022.78 on that date, and the purchase of these various bonds that you have spoken of, and taking into consideration the collection of the coupons and various other matters, whose bonds were those, in your opinion?

* * * * *

A. They were Robert F. Westcott's bonds." (Rec., 6999.)

"Q. The next bonds on this list of October 29, 1897, were 10 Morris & Essex 7s. When were those purchased?

A. Nine of them were purchased April 28, 1893, and one was purchased May 1, 1893, by C. H. Van Deventer in the name of Robert F. Westcott.

Q. These are the bonds, are they not, that are accounted for by Robert F. Westcott, in his check for a balance, dated May 2, 1893, for $489.86?

A. Those are the bonds which in that settlement were treated as a part of the estate of Captain Carter's deceased wife.

Q. And they are charged against Carter in that statement, or credited to Westcott on the theory that Westcott turned them over to Carter, are they not?

A. Yes, sir.

Q. And Westcott's check in his own handwriting is for the balance after those transactions were consummated?

A. Yes, sir.

Q. Those bonds were paid by Carter to Westcott, on Exhibit 96-F, as part payment for the Orange real estate, were they not?

A. They were; yes, sir.

Q. This Orange real estate was property which Westcott had owned for something like 25 years, was it not, according to the testimony?

A. He had owned it for some time, I do not remember the period.

Q. There is no dispute, is there, but what Westcott had owned that property for a long period of time, as far as you know?

A. I do not know of any dispute." (Rec., 7407-08.)

"Q. The bonds were found in Westcott's possession October 29, 1897, were they not?

A. He delivered them to Captain Carter on that date.

Q. He had them in his possession before he delivered them, didn't he?

A. They must have been in his possession or the possession of his agents.

Q. Whatever coupons Carter may have had off of these bonds after he traded them to Westcott are charged against his allowance, are they not?

A. They are charged as a part of his pro rata allowance for that year; yes, sir.

Q. The next bonds on that list are three Morris & Essex 4½s?

A. They were purchased October 9, 1894, by Reed & Flagg for Robert F. Westcott.

Q. How were they paid for?

A. By Robert F. Westcott's check on the Union Trust

Company for $43,911.42 and $10 in currency deposited with Reed & Flagg on that date, and that check covered the purchase price of other bonds, in addition to the three Morris & Essex 4½s.

Q. You have before you Westcott's original check with which he purchased those other bonds?

A. I have; yes, sir.

Q. It is admittedly in the handwriting of Robert F. Westcott?

A. Yes, sir." (Rec., 7410-11.)

"Q. Where was Carter when Westcott bought these bonds?

A. On the Canadian Pacific Railroad near Winnipeg.

Q. On October 9, 1894?

A. Yes, sir.

Q. Taking into consideration these facts and the undisputed fact that they were bought in Robert F. Westcott's name, through Reed & Flagg, to whom a check was given, who would you say purchased those bonds, Westcott or Carter?

A. I should say Robert F. Westcott purchased those bonds.

Q. This check is against the private bank account of Robert F. Westcott, is it not?

A. It is; yes, sir.

Q. Taking those things into consideration, whose bonds would you say those were in making up an account as an expert accountant, whose bonds would you consider these to be at the time they were purchased?

A. Robert F. Westcott's." (Rec., 7012.)

"Q. The bonds were found in his possession on October 29, 1897, were they not?

A. Yes, sir.

Q. That is the day he turned them over to Carter?

A. Yes, sir.

Q. The next bonds on this list are 5 Wabash D. & C., when were those purchased?

A. Those were purchased February 13, 1893.

Q. Who by?

A. They were purchased by Van Deventer in the name of O. M. Carter.

Q. They were paid for out of the money that came from Carter's wife's estate, were they not?

A. They were paid for with funds deposited with Van Deventer on that date, and as between Captain Carter

and Robert F. Westcott in a settlement made May 2, 1893, they were treated as having been purchased with funds from the estate of Captain Carter's deceased wife.

Q. These funds are mentioned on that memorandum on the back of that poem that has been in the possession of the Government from the beginning, aren't they?

A. Yes, sir." (Rec., 7411-12.)

"Q. (Mr. Stone.) These are part of the bonds which Carter traded to Westcott on May 10, 1897, in payment for the half interest in the Orange real estate, as shown by Defendants' Exhibit 96-F, are they not?

A. Yes, sir.

Q. These bonds were found in the possession of Robert F. Westcott on October 29, 1897, were they not?

A. They were delivered by him to Captain Carter on that date; yes, sir.

Q. The coupons due in July, 1897, were also found in his possession on October 29, 1897, were they not, in the possession of Westcott?

A. They were still attached to the bonds when they were delivered to Captain Carter; yes, sir.

Q. *Now, if Carter had had access to these bonds in July, 1897, there is no reason why he should not have deposited the coupons, as far as it appears?*

A. *There is not; he deposited coupons from bonds in July,* 1897.

Q. And in August, 1897?

A. Yes, sir.

Q. When there were no charges or any idea of any charges against him, at that time, as far as it appears?

A. That is true.

Q. Is there anything to show why those coupons for July, 1897, on these 5 Wabash bonds were not collected?

A. There is no evidence in the record to show why they were not.

Q. Some of those other bonds which Westcott had on October 29, 1897, also had uncollected coupons on them?

A. Yes, sir.

Q. The fact that the coupons on those bonds were not collected July 1, 1897, would show that the bonds had ceased to belong to Carter, in view of the fact that he was depositing all the coupons that he had?

A. It would indicate that he did not have possession of the bonds at that time.

Q. In making up an account as an expert accountant

in regard to this transaction of the purchase of the Orange real estate, and the payment of these bonds on account of it, May 10, 1897, the fact that Carter did not collect the coupons on these bonds July, 1897, although he did collect coupons off other bonds, would make a strong corroboration of the fact, would it not, that he had paid those bonds to Westcott on May 10, 1897?

A. Yes, sir." (Rec., 7415-16.)

"Q. The next bonds on this list are 10 Chicago, Milwaukee & St. Paul 7s; when were they bought?

A. They were bought May 18, 1893, by Van Deventer in the name of Robert F. Westcott.

Q. How much did they cost?

A. $12,662.50.

Q. How were they paid for?

A. They were paid for in part by the proceeds of one Houston & Texas bond sold by Van Deventer for Westcott, May 15, 1893, and in part by a deposit of $3,000 in currency made by Westcott with Van Deventer May 15, 1893, and substantially all of the balance by a check of Westcott's on the Union Trust Company dated May 18, 1893, payable to Van Deventer for $9,014.75." (Rec., 7416-17.)

The Witness: "They were purchased by C. H. Van Deventer, a broker, for Robert F. Westcott.

Q. Who paid for them?

A. Robert F. Westcott.

Q. Where did he get the money to pay for them?

A. A considerable portion of it from the sale of other bonds.

Q. Well, other bonds that are involved in this case?

A. No, sir.

Q. Bonds that are not involved in this case?

A. Yes, sir." (Rec., 6676.)

"Q. These 10 Chicago, Milwaukee & St. Paul bonds, at the time that they were bought by Mr. Westcott on May 18, 1893, were bought by him and paid for by him out of moneys that did not have anything to do with this case, were they not?

A. Yes, sir.

Q. And hence those bonds belonged to him at that time, did they not?

A. So far as it appears, and these bonds were paid ror with his funds." (Rec., 6693-94.)

"Q. You have just gone over the manner in which they were purchased and how they were paid for?

A. Yes, sir.

Q. Whose bonds were they ?

A. They were Mr. Westcott's bonds." (Rec., 6394-95.)

"Q. The next bonds mentioned on this list are 4 United States 5s; when were those bought?

A. They were a portion of the 25 U. S. 5s bought through Reed & Flagg in the name of Robert F. Westcott, October 9, 1894.

Q. They were paid for by Robert F. Westcott's personal check on the Union Trust Company, were they not, those and the other bonds?

A. They were paid for with his personal check for $43,911.42 and $10 of currency.

Q. You have his check, admittedly in his handwriting, before you have you not?

A. I have; yes, sir.

Q. So Westcott knew about these bonds in October, 1894, didn't he?

A. He did; yes, sir.

Q. In that purchase of October, 1894, there were 25 of these bonds, weren't there?

A. There were; yes, sir.

Q. And on March 6, 1895, Carter sold 20 of them, didn't he, on behalf of Robert F. Westcott?

A. Yes, sir." (Rec., 7420.)

"Q. Where was Carter when Westcott bought these bonds?

A. On the Canadian Pacific Railroad near Winnipeg.

Q. On October 9, 1894?

A. Yes, sir.

Q. Taking into consideration these facts and the undisputed fact that they were bought in Robert F. Westcott's name, through Reed & Flagg, to whom a check was given, who would you say purchased those bonds, Westcott or Carter?

A. I should say Robert F. Westcott purchased those bonds.

Q. The check is against the private bank account of Robert F. Westcott, is it not?

A. It is; yes, sir.

Q. Taking those things into consideration, whose bonds would you say those were in making up an account

as an expert accountant, whose bonds would you consider these to be at the time they were purchased?

A. Robert F. Westcott's." (Rec., 7012.)

The Witness: "On March 6, 1895, 20 M. of the 25 M. bonds, which were purchased on October 9, 1894, were sold through Reed & Flagg for account of Robert F. Westcott, and the greater portion of the funds reinvested in U. S. 4's.

Q. The reinvestment of these funds appears on Division 24 of Complainant's Exhibit 319, does it not?

A. Yes, sir." (Rec., 7018.)

"Q. (Mr. Stone.) It is there stated that these particular 25 U. S. coupon bonds were purchased October 11, 1894, by Robert F. Westcott through Reed & Flagg, and that Robert F. Westcott gave his individual check upon his private bank account to pay for them, and the record is undisputed that at or about the time Westcott went to Europe, January 29, 1895, that he gave Carter a written power of attorney both to sell Westcott's bonds and to buy bonds for Westcott, and it appears that on March 6, 1895, that Carter, acting as Westcott's attorney, sold 20 of these bonds through Reed & Flagg, the same brokers through whom Westcott had purchased the bonds, and that the transaction was done in Westcott's name and the proceeds accounted for to Westcott's account on their books. Under those circumstances, what would you say, if you were making up an account as an expert accountant, as to whether these bonds were sold by Carter under that power of attorney, for the benefit of Robert F. Westcott?

* * * * *

A. I would say they were sold for the benefit of Robert F. Westcott and the bonds in which the funds were reinvested were Robert F. Westcott's bonds." (Rec., 7019.)

"Q. The coupons which became due on these remaining 5 U. S. bonds, up to those which became due February 1, 1896, were deposited to the credit of R. F. Westcott, were they not?

A. Yes, sir." (Rec., 7019.)

"Q. You say one of these bonds was sold April 24, 1897?

A. Yes, sir.

Q. Who sold it?

A. Reed & Flagg sold it and credited the proceeds to Robert F. Westcott.

Q. Westcott was in this country at that time, was he not?

A. He was; yes, sir.

Q. And that bond was sold for his benefit, was it?

* * * * *

A. It was; yes, sir.

Q. Have you Westcott's account with Reed & Flagg?

A. I have; yes, sir.

Q. Did Westcott get the benefit of the sale of that bond in that account?

A. The account of Reed & Flagg with Robert F. Westcott, as taken from their books, Complainant's Exhibit 239, shows that on April 24, 1897, Reed & Flagg sold 1 M. U. S. coupon bond for Robert F. Westcott for $1,141.25, and credited his account with that amount, and that on the same day they drew their check for that exact amount payable to the order of Robert F. Westcott in settlement of the account.

Q. What became of the check?

A. The check was deposited in the bank account of Robert F. Westcott at the Union Trust Company, the deposit ticket being in the handwriting of Robert F. Westcott.

Q. What date?

A. April 24, 1897?

Q. Is there any indication anywhere that Carter got the benefit of that check?

A. There is not." (Rec., 7021-22.)

"Q. Now, then, independent of Carter's testimony on that subject, but taking into consideration all the facts you have stated in regard to these bonds and so forth, in making up an account as an expert accountant, whose bonds would you consider those to have been from the time Westcott purchased them himself on October 4, 1894, up to the time that he turned them over to Carter on October 11 and October 29, 1897?

A. I would consider that they belonged to Robert F. Westcott; and that opinion would be very much strengthened by the fact that by periodical accountings between Captain Carter and Robert F. Westcott after the purchase of the bonds, their proceeds were treated as the property of Robert F. Westcott." (Rec., 7029.)

"Q. It would be strengthened also by the fact, would it not, that Westcott on April 24, 1897, sold one of these bonds himself and took the money and used it for his own private purposes?

A. It would, yes, sir.

Q. Did he ever account to Carter for that money?

A. He did not." (Rec., 7029.)

"Q. That completes all the bonds, does it not, which Carter received from Westcott on October 11 and October 29, 1897?

A. It does; yes, sir.

Q. The total of those bonds is how much?

A. $285,000 par value.

Q. That embraces, does it not, all the bonds which are in controversy in this case?

A. Yes, sir.

Q. Carter inherited or received from his wife's estate, didn't he, according to Defendants' Exhibit 96-A, about $50,000?

A. About $50,000; yes, sir.

Q. Which was invested in bonds, was it not?

A. Yes, sir; bonds and some stocks, I think.

Q. All invested in bonds originally, was it not, that is on May 2, 1893, it was all invested in bonds?

The only stock at that time was $3,400 tow boat stock, wasn't it?

A. Yes, sir; it was all invested in bonds, with the exception of the tow boat stock.

Q. The tow boat stock was given to Carter by Westcott in addition, then, wasn't it?

A. The tow boat stock came out of the $50,000, though.

Q. Well, by that statement there were 285 bonds delivered by Westcott to Carter on October 11 and 29, 1897, were there not?

A. Yes, sir.

Q. As to about $50,000 of those bonds, the Defendants' Exhibit 96-A and the evidence in the case show that Carter may have had about $50,000 of bonds from his wife's estate or from money which he had saved out of what Westcott gave him, don't it?

A. Yes, sir.

Q. That would leave about $235,000 of bonds not thus accounted for, would it not?

A. It would.

Q. You have been over this line of bonds here and gone into the history of those bonds and Robert F. Westcott's checks, deposit slips, and so forth, and I will ask you if Robert F. Westcott stated at any time after September, 1897, that he knew nothing about this $235,000 worth of bonds, did he tell the truth?

A. He did not. He could not have truthfully made such a statement.

Q. You have before you, have you not, Mr. Westcott's checks, admittedly in his handwriting, his deposit slips in his own handwriting, showing that during the years 1893, 1894, 1895, 1896 and 1897 he either purchased those bonds by checks admittedly his own, or he deposited the coupons off of these bonds in deposit slips admittedly his own, or you have before you other documentary evidence produced by the complainant showing that Westcott knew about those bonds either at the time they were purchased or prior to the time this trouble commenced in September, 1897?

A. I have in my hand the checks in the handwriting of Robert F. Westcott, and deposit slips in the handwriting of Robert F. Westcott, made out by him personally, for at least $230,000 par value of the bonds which he delivered to Captain Carter on October 11, 1897, and October 29, 1897, and I have before me the account of Robert F. Westcott with his bond brokers and with his bank which show that Robert F. Westcott must have had personal knowledge of the purchase of those bonds and of the transactions in relation to them from the date of their purchase until he delivered them to Captain Carter in October, 1897.

Q. Some of these bonds were purchased in 1893, were they not?

A. Yes, sir.

Q. Some in 1894?

A. Yes, sir.

Q. Those purchased in 1895 were purchased when Westcott was in Europe, were they not?

A. Yes, sir.

Q. Some were purchased in 1896?

A. Yes, sir.

Q. And there are no bonds purchased in 1897, were there, none of these bonds?

A. None of these bonds; Westcott purchased some bonds in 1897.

Q. But none of these 230 to which you refer?

A. That is true.

Q. These checks show, do they not, that he bought and paid for some of these bonds in 1893?

A. They do.

Q. These checks show that he bought and paid for some of these bonds in 1894?

A. Yes, sir.

Q. And that he collected coupons off of many or most of these bonds in 1894?

A. Yes, sir.

Q. If he stated after this trouble commenced, in August or September, 1897, that he was surprised with regard to those bonds, or surprised that anybody had those bonds, did he tell the truth?

A. He did not tell the truth, and if he testified to such a fact, his testimony was perjury." (Rec., 7429-32.)

"Q. You have already testified, have you not, in making up an account as an expert accountant, taking into consideration Westcott's checks by which he purchased many of these bonds, and his deposit slips by which he deposited at various times in 1893 and 1894 the coupons from these bonds, that you would treat these bonds as having been purchased by Robert F. Westcott for his own benefit and as his own bonds, have you not?

A. Yes, sir.

Q. Only one of these bonds was bought in 1896, was it?

A. That is true; only one bond, one U. S. 5 was bought in 1896.

Q. That was bought by Westcott himself, wasn't it?

A. Yes, sir.

Q. There were 55 of the bonds included in that 285 that were bought by Carter as Westcott's attorney in the year 1895, were there not?

A. Yes, sir.

Q. Those are the only bonds included in the whole 285 bonds that Carter bought as Westcott's attorney, are they not, during Westcott's absence in Europe?

A. Yes, sir.

Q. He did not buy any other bonds as Westcott's attorney, as far as it appears?

A. Those are the only ones, yes.

Q. I think you testified once or twice he delivered a personal order to Reed & Flagg on behalf of Mr. Westcott, while Westcott was in this country, to purchase some bonds, did he not?

A. I think Carter testified to that fact.

Q. But the total amount of bonds purchased for Westcott while Westcott was in Europe, by Carter through the Union Trust Company, by R. F. Westcott, O. M. Carter, attorney, that were included in the 285 bonds, are 55 bonds isn't that so?

A. Yes.

Q. All the remainder of the 285 M. bonds were bought in 1893 and 1894, were they not?

A. Yes, sir; with the exception of the one bond bought in 1895, about which I testified.

Q. No bonds bought in 1897, any of the 285?

A. None of them were purchased in 1897.

Q. One hundred and forty-five M. of these bonds were bought in 1893, were they not?

A. That is true; yes, sir; 145 M. were purchased in 1893.

Q. And 84 M. in 1894?

A. Yes, sir; 84 M. in 1894.

Q. In other words, Westcott delivered to Carter on October 11, and October 29, 1897, 285 M. of railroad bonds and United States bonds, did he not?

A. Yes, sir.

Q. Those bonds were purchased as follows, were they not: in the year 1893 when Westcott was in the United States, 145 M., in the year 1894 when Westcott was in the United States, 84 M.?

A. Yes, sir.

Q. In the year 1895 when Westcott was absent in Europe, 55 M.?

A. Yes, sir.

Q. In the year 1896 when Westcott was in the United States, 1 M.?

A. Yes, sir.

Q. Total, 285 M.?

A. Yes, sir.

Q. Westcott would not be surprised, would he, that Carter had 50 M. or so of bonds in 1897 coming from his wife's estate if he considered those bonds which were paid for the Orange real estate as still belonging to

Carter, he could not be surprised at that fact, but as to the other 230 M. if he expressed any surprise with regard to those bonds, that surprise was not justified, was it, because he bought practically all or a very large part of those bonds himself in 1893 and in 1894, and in numerous instances collected the coupons off of the same, is that correct?

A. That is correct.

Q. *Is there the slightest evidence in Exhibit* 319 *or in the evidence to which Mr. Johnson refers as the basis of* 319, *or anywhere else that you have been able to discover, which would justify an expert accountant in treating these bonds bought in* 1893, *in* 1904, *in* 1895 *and in* 1896 *as belonging to Carter at the time they were purchased, except those few bonds which are said to be and described as bonds which were purchased with Carter's wife's estate?*

* * * * *

A. *There is not.*

Q. (Mr. Stone.) *Is there in the record a large amount of evidence furnished by the complainant, and documentary evidence admittedly in the handwriting of Robert F. Westcott, which would lead an expert accountant, in making up an account, to treat those bonds, except those bought with Carter's wife's estate, as being the bonds of Robert F. Westcott and belonging to him and purchased with his own money at the time they were bought?*

A. *Yes, sir.*" (Rec., 7433-36.)

For the testimony showing the methods adopted by Westcott to keep watch on his bank account, against which he gave Carter power of attorney, in 1895 and 1896, see (Rec., 7547-83; 7513-15; 7523-24; 7731).

Concerning the collection of coupons from the bonds belonging to Westcott, and from bonds belonging to the estate of Carter's wife, McPherson testifies:

"Q. * * * I would like to have you look at Westcott's account with Van Deventer November 1, 1893, and see what coupons he did collect on that date?

A. He collected on that date coupons off 5 Chesapeake & Ohio bonds $125.

Q. What did he do with that, with the money thus collected?

A. It was credited to his account.

Q. Did he send it to Carter? I call your attention to Defendants' Exhibit 96-C?

A. It is included in Westcott's check of $715.62, dated November 15th.

Q. Now, what else did he collect that day?

A. He collected also the coupons on 5 Chicago & Eastern Illinois bonds $125.

Q. Are those included in that check to Carter of November 15th?

A. They are; yes, sir.

Q. What else did he collect?

A. He collected the coupons off 10 Chicago & Northwestern bonds, $175.

Q. Did he send Carter the money off those coupons?

A. He did not. He collected also the coupons on the 5 Wabash bonds, $125.

Q. Did he send Carter the money for the coupons off those bonds?

A. He did; he accounted to him for that.

Q. In the check that he drew November 15th?

A. That is true; then he collected also the coupons off 10 Milwaukee, Lake Shore & Western bonds.

Q. Did he send the money for those coupons to Carter?

A. He did not. He also collected the coupons off 10 Wabash bonds, $250.

Q. Did he send that money to Carter?

A. He did not. He also collected the coupons off 10 Winona & St. Peter bonds, $350.

Q. Did he send the money for those coupons to Carter?

A. He did not.

Q. He appears to have collected November 1st at one single transaction coupons amounting to $1,450, doesn't he?

A. Yes, sir.

Q. And out of that $1,450, he accounted to Carter for how much?

A. $375.

Q. In that same transaction, he collected some coupons off some of the bonds which they claimed belonged to Carter, didn't he?

A. Yes, sir.

Q. These bonds are Carter's wife's estate bonds, aren't they?

A. The Chesapeake & Ohio, Chicago, Eastern Illinois and 5 Wabash bonds were the bonds of Carter's wife's estate.

Q. As to these, he collected the coupons November 1st and accounted to Carter for the proceeds by a check of November 1, 1893?

A. He did; yes, sir.

Q. As to these other bonds, he collected the coupons off of these as part of the same transaction?

A. Yes, sir; he collected the coupons off of the Chicago & Northwestern and Milwaukee, Lake Shore & Western bonds as part of the same transaction. Those bonds being claimed by the complainant to have belonged to Carter at that time.

Q. He did not remit that money to Carter, did he?

A. He did not.

Q. The amount of his check is not large enough to have covered the two sets of bonds, is it?

A. It is not.

Q. He collected some more coupons as part of that same transaction, didn't he?

A. Yes, sir; he collected $600 from 10 Wabash and 10 Winona & St. Peter bonds, which are admittedly his bonds.

Q. It appears then, and that is mentioned, is it not, in Defendants' Exhibit 98, that on November 1, 1893, he collected from Van Deventer as one transaction $1,450 of coupons, $375 of which came off of Mrs. Carter's bonds, $475 from bonds in court and $600 in bonds admittedly R. F. Westcott's?

A. Yes, sir; that is so.

Q. And he accounted to Carter in that check of Novemver 15th for the $375 from Mrs. Carter's bonds but he kept and used the proceeds of $475 off of the bonds which the complainant claims belonged to Carter and kept and used the proceeds of the $600 worth of coupons off bonds which were admittedly R. F. Westcott's?

A. Yes, sir." (Rec., 7693-96.)

"Q. * * * I call your attention to Defendant's Exhibit 98, under date of December, 1893, and it appears that Westcott collected $1,125 of coupons on that date, does it not?

A. It appears that on December 1, Westcott collected through his broker, Van Deventer, $950 of coupons, and on the 8th $175 more, making a total of $1,125 of the coupons, $950 which he collected on December 1st, $650 with the coupons from 10 Morris & Essex and 10 Chicago, St. Paul, Minneapolis & Omaha which are claimed by the defendant to be bonds from Carter's wife's estate and are admitted by the complainant to have belonged to Carter at that time; Westcott collected at the same time $300, being coupons on 5 Chicago, Minneapolis & Omaha bonds, and 5 Milwaukee & Northern bonds, which were admittedly his bonds.

Q. What is the next item on that account?

A. On December 8, 1893, Captain Carter is charged and Westcott credited $11,637.50 that being the cost price of 10 Milwaukee & St. Paul bonds purchased by Van Deventer for Robert F. Westcott on that date and charged by him to the account of Robert F. Westcott. The next item is a debit to Carter and a credit to Westcott dated December 21, 1893, representing the check of Robert F. Westcott drawn on that date in favor of himself and deposited by him in the Union Trust Company to the credit of O. M. Carter for $1,244.88.

Q. Anything more on that page?

A. In the column headed "Collection of coupons and dividends" there is entered an item of $1,225 under date of January, representing interest coupons on 5 Wabash bonds $125, on 10 Chicago, Milwaukee & St. Paul bonds $350, and on 20 New York, Lackawanna & Western bonds $750, making a total of $1,225, and the notation shows that those coupons were credited to the account of Robert F. Westcott in the Union Trust Company.

Q. At the same time that he collected this $1,225 of coupons there, he collected other coupons, did he not?

A. During the same month he collected other coupons; yes, sir.

Q. He collected $125 of coupons off of 5 Wabash bonds belonging to Carter's wife's estate, didn't he?

A. Yes, sir.

Q. He accounted to Carter for those coupons in his check of January 27, 1894, $171,14, did he not?

A. Yes, sir.

Q. Did he ever account to Carter for the $1,225 in

coupons which he collected off the bonds in controversy herein?

A. He did not account to Carter for the balance of the $1,225." (Rec., 7697-98.)

"Q. It does appear, does it not, that in every instance where he collected any coupons off Carter's wife's estate bonds that he promptly accounted to Carter for the proceeds thereof?

A. Yes, sir." (Rec., 7700.)

"Q. And isn't it equally true in every other instance, where he collected coupons off any of the other bonds that he never accounted to Carter for any of the coupons, unless he accounted to him for them when he delivered those securities to him in October, 1897?

A. That is true.

Q. So that if there were an accounting by Westcott to Carter it was certainly not before October, 1897?

A. There is not any appearance of an accounting for those securities at that time.

Q. But I say, up to that time he certainly did not account to him in any way, did he?

A. He did not.

Q. As to the coupons off any of the bonds in controversy, except those in Carter's wife's estate, there is no evidence, is there, referred to on Exhibit 319, or Exhibit 590, or any of these other exhibits that shows that he accounted to Carter for a penny of the coupons off these bonds in controversy prior to October, 1897?

A. There is absolutely no evidence to show any accounting for these coupons; there is, of course, evidence of large gifts to Captain Carter but they do not correspond with the coupons or the amounts of the accountings.

Q. Is there any evidence that he accounted in October, 1897, for any of these coupons?

A. There is not.

Q. *It appears, therefore, to sum this whole thing up, that Westcott collected and used the coupons off from all the bonds in court except those belonging to Carter's wife's estate up to October,* 1897, *used the money for his own purposes?*

A. *Yes, sir.*

Q. *And as to the bonds from Carter's wife's estate, that he frequently collected these coupons at the same time*

that he collected coupons off of these other bonds, that he carefully accounted to Carter for the coupons off of his wife's estate bonds, and never accounted to him for the coupons off the other bonds?

A. It does so appear." (Rec., 7701-02.)

ROBERT NELSON testifies:

"Q. Do you occupy any position in any accounting corporation or firm?

A. I am Vice-President and Manager of the International Audit Company of Chicago.

Q. Have you had considerable experience in accounting matters?

A. I have had a very large experience in accounting matters, extending over the last eighteen years.

Q. In order that I may give you an idea of what the situation is in this case and upon which I desire to have you testify, I will state that these are suits brought by the United States against Oberlin M. Carter and others to recover certain bonds and other property which were admittedly transferred in October, 1897, by Robert F. Westcott finally to Carter. These transfers were made in two of the principal law offices in the City of New York, the first transfer being on October 11, 1897, and the second being on October 29, 1897. The first transfer was of $63,000 in bonds transferred by Westcott to Carter on October 11, 1897, in the office of Thomas Thacher, who at or about that time was the partner of ex-Speaker Reed. The testimony shows the transfer was made in the presence of Mr. Thacher, Captain Carter and Mr. Westcott, and that a written receipt was taken by Mr. Westcott from Carter for the $63,000 of bonds. Carter testifies that these bonds were transferred to him by Westcott in payment or exchange for what is known as the Orange property, which Carter had bought from Westcott some time prior, paying therefor principally by money inherited by him or received by him from his wife's estate. The other transfer was made on October 29, 1897, in the office of Elihu Root and others, in the presence of Mr. Root's partner, Mr. Stimson, and in the presence of Mr. Westcott and of Captain Carter and of Mr. Rose, Captain Carter's attorney, and the transfer took place in the office of Root & Stimson. The evidence shows that prior to this transaction of October 29, 1897, there was correspondence between Mr. Stimson, who was Westcott's attorney, and Mr. Rose,

who was Carter's attorney, with regard to the kind of papers to be used in carrying out the transfer. The evidence also shows that during the month of October, 1897, Carter was on trial before a Board of Engineers, charged with having received money directly or indirectly from Greene and Gaynor, who were contractors under his charge in the Savannah District. The newspapers at that time, the evidence shows, were full of these matters, so it was a matter of general public knowledge as to what was going on. The evidence also shows that Carter receipted in detail for the bonds and securities which he received on October 29, 1897.

* * * * *

I now call your attention to the receipts which Carter gave for those securities—

* * * * *

Q. * * * First, the receipt of October 11, 1897, and ask you if the bonds thus received by Carter from Westcott on October 11, 1897, are not described in detail so that they could be readily traced?

A. They are.

Q. They consist entirely of railroad and United States bonds, do they not?

A. Yes, sir.

Q. And the rate of interest is stated on each of the bonds?

A. Yes, sir.

Q. And the number of each bond is given, is it not?

A. Yes, sir.

Q. So that if those bonds were the proceeds of any illegitimate transactions, they could have been readily traced by that receipt, could they not?

A. Yes, sir.

Q. I now call your attention to the receipt of October 29, 1897, given by Carter to Westcott for the other property mentioned, and ask you if it is not a fact that it embraces 218 railroad bonds and 4 Government bonds, of face value $222,000?

A. Yes, sir; it does.

Q. The rate of interest on these bonds is stated, is it not?

A. Yes, sir; in each case.

Q. The name of the railroad issuing the bonds is stated, is it not, not only on this receipt, but on the one of October 11th?

A. That is so.

Q. And the number of each bond is given on this receipt, is it not?

A. Yes, sir.

Q. So that those bonds, if they were the proceeds of any illegitimate transaction, could be readily traced, could they not?

A. They could." (Rec., 7814-17.)

The Witness: "With the information upon these receipts the securities could be easily traced.

Q. There was no attempt, therefore, to conceal exactly what was received, and a full description of it?

A. No, sir.

Q. We will now take up the question of where these bonds and other property originally came from, that is, as to who bought them and when they were bought and various other circumstances connected with their history; and I first call your attention to 5 Chesapeake & Ohio bonds, and ask you if you find them on these receipts?

A. Yes, sir, they are there.

Q. On which receipt?

A. The receipt dated 29th October, 1897.

Q. I now call your attention for sake of convenience to Complainant's Exhibit 319, Division No. 3, and ask you if it does not show that these bonds were bought on February 11, 1893, by O. M. Carter?

A. They were, according to this Exhibit 319, Division 3.

Q. I now call your attention to Defendants' Exhibits 96-F and ask you if those bonds appear to have been paid by Carter to Westcott on account of the Orange real estate, assuming Defendants' Exhibit 96-F to be correct?

A. That is true.

Q. That being so, these bonds became the property of Robert F. Westcott on May 10, 1897, did they not?

A. Yes, sir.

Q. And hence unless some change took place in the title between that time and October 29, 1897, they were Robert F. Westcott's at the time he delivered them to Carter October 29, 1897?

A. They were, yes, sir.

Q. I next call your attention to 5 Wabash Extension bonds, and ask you which receipt those are on?

A. The receipt of 29th October, 1897.

Q. I call your attention to Complainant's Exhibit 319, Division 3, and ask you if the complainant does not admit that these bonds were bought on February 13, 1893, by Carter?

A. Yes, sir.

Q. I call your attention to Defendants' Exhibit 96-F under date of May 10, 1897, and ask you if that does not show that those bonds were paid by Carter to Westcott as part payment for the Orange real estate?

A. It does so show.

Q. That would make the bonds Robert F. Westcott's, would it not?

A. Yes, sir." (Rec., 7819-21.)

"Q. That would show those bonds were his unless there was some change in the ownership, would it not, that they still belonged to Robert F. Westcott on October 29, 1897?

A. Yes, sir.

Q. And when he transferred them to Carter on that date, he would transfer them as his own property, would he not?

A. Yes, sir.

Q. I next call your attention to 5 C., St. P., M. & O. bonds, and ask you if those are on either receipt?

A. They are.

Q. On which one?

A. There are 10 bonds appearing on the receipt 29th October, 1897.

Q. You can take 5 of them for the present, and I will ask you if it does not appear by Complainant's Exhibit 319, under date of April 11, 1893, that those bonds were bought by O. M. Carter?

A. It so appears.

Q. You have checked the numbers, have you?

A. Yes, I have checked the numbers, there is a little difference between one that is given here as 16,101 and it appears there as 16,102.

Q. I believe that is admitted to be an error. So they check there, do they?

A. Yes, sir.

Q. I call your attention to Defendants' Exhibit 96-F, under date of May 10, 1897, and ask you if it does not appear by that exhibit, assuming it to be true, that at least 5 C., St. P., M. & O. bonds were paid by Carter to Westcott on that date, in part payment for the Orange real estate?

A. Yes, sir, it appears so here.

Q. That being so, these bonds would be the property of Robert F. Westcott, would they not?

A. They would.

Q. In the absence of any evidence to the contrary would continue to be his property till October 29, 1897, would they not?

A. Yes, sir.

Q. And on the latter date when he delivered or transferred them to Carter they would be transferred as his own bonds, would they not?

A. Yes, sir.

Q. I next call your attention to 10 Chicago & Northwestern bonds and ask you which receipt those are on?

A. They appear on the receipt of October 29, 1897.

Q. I call your attention to Complainant's Exhibit 319, Division 5, and ask you if it does not appear there that those bonds were bought in the name of O. M. Carter on April 14, 1893?

A. It so appears.

Q. What is the cost price?

A. $13,612.50.

Q. Does it also appear by that statement that Robert F. Westcott gave his personal check on the Union Trust Company to C. H. Van Deventer for $14,742.64 which was more than enough to pay for those bonds?

A. Yes, sir.

Q. And it also appears that that check was used towards the payment of those bonds, does it not, in connection with other transactions? I mean in this statement made by Mr. Johnson it so appears?

A. Yes, sir, it so appears.

Q. I next call your attention to 10 Morris & Essex bonds, and ask you if those are on either of those receipts?

A. Yes, sir, there are 10 Morris & Essex bonds on the receipt 29th October, 1897, that is Morris & Essex 7's.

Q. I call your attention to Complainant's Exhibit 319, Division 5, and ask you if it is not there admitted that these bonds were bought on April 28th and May 1, 1893, for Robert F. Westcott by C. H. Van Deventer?

A. Yes, sir, the 10 Morris & Essex bonds appear here as being purchased by Robert F. Westcott.

Q. Are those the same bonds as to numbers?

A. Yes, sir, they are the same as to the numbers?

Q. Now, I call your attention to 5 C., St. P., M. & O.

bonds bought April 28, 1893, and ask you if those are on either of those receipts? You have already had 5 of them, are there 5 more?

A. There are 5 more on the receipt dated 29th October, 1897.

Q. I call your attention to Complainant's Exhibit 319, Division 5, and ask you if it is not there stated that those 5 bonds were bought April 28, 1893, by C. H. Van Deventer for Robert F. Westcott?

A. Yes, sir, these bonds appear as you have stated, and are correct as to number.

Q. I now call your attention to 10 Chicago, Milwaukee & St. Paul bonds bought May 18, 1893, and ask you if those are on either of these receipts?

A. They appear on the receipt dated 29th October, 1897.

Q. I call your attention to Complainant's Exhibit 319, Division 6, and ask you if it is not there stated that these bonds were bought by C. H. Van Deventer for R. F. Westcott?

A. Yes, sir, they were.

Q. I next call your attention to 10 Milwaukee, Lake Shore & Western bonds bought June 7, 1893, and ask you if these are on either of these receipts?

A. They appear on the receipt dated 29th October, 1897.

Q. I call your attention to Complainant's Exhibit 319, Division 7, and ask you if it is not there stated that these bonds were bought by Van Deventer for R. F. Westcott?

A. Yes, sir, it does so appear.

Q. I next call your attention to 30 M. Long Dock bonds and ask you if these are on either of these receipts?

A. Yes, sir, there are 50 Long Dock bonds appearing on the receipt of 29th October.

Q. Take 30 of them bought July 11, 1893, I call your attention to Complainant's Exhibit 319, Division 8, and ask you if it is not there stated that 30 M. of those bonds were bought by Reed & Flagg for R. F. Westcott?

A. Yes, sir, it so appears.

Q. I next call your attention to 10 M. Delaware & Hudson bonds bought August 10, 1893, and ask you if these are on either of these receipts?

A. They appear in the receipt of the 29th of October, 1897.

Q. I will call your attention to Complainant's Exhibit

319, Division 9, and ask you if it does not state there that these bonds were bought by Reed & Flagg for Robert F. Westcott?

A. It does so appear.

Q. I next call your attention to 5 M. New Jersey Junction bonds and ask you if those are on that receipt?

A. Yes, sir; they appear on the receipt of 29th, October, 1897.

Q. I now call your attention to Complainant's Exhibit 319, Division 10, and ask you if it is not there stated that these bonds were bought by Reed & Flagg September 11, 1893, for R. F. Westcott?

A. It does so appear.

Q. Now, I call your attention to 15 New York, Lackawanna & Western bonds, and ask you if these are on either receipts?

A. They are on the receipt dated 29th, October, 1897.

Q. I call your attention to Complainant's Exhibit 319, Division 10, and ask you if it is not there stated that these bonds were bought September 18, 1893, by Reed & Flagg for R. F. Westcott?

A. Yes, sir; it does so appear.

Q. I next call your attention to 10 more New York, Lackawanna & Western bonds, and ask you if these appear upon either of those receipts?

A. Yes; there are 10 more appearing in the same receipt, namely, 29th October, 1897.

Q. I call your attention to Complainant's Exhibit 319, Division 11, and ask you if it is not there stated that those 10 bonds were bought on October 16th and 18th, 1893, by Reed & Flagg for R. F. Westcott?

A. It does so appear.

Q. I call your attention to 5 Lake Shore & Michigan Southern bonds, and ask you if these are on either receipt?

A. Yes; they appear on the receipt dated October 11, 1897.

Q. There are 20 on this receipt, aren't there?

A. Yes, sir.

Q. I am now calling your attention to 5 of them. I will call your attention to Complainant's Exhibit 319, Division 12, and ask you if 5 of those bonds do not appear to be bought November 9, 1893, by C. H. Van Deventer for R. F. Westcott?

A. That is true, it does so appear.

Q. I call your attention to 10 Milwaukee & St. Paul bonds and ask you if they are on either receipt?

A. They are on the receipt dated 11th October, 1897.

Q. Look at Complainant's Exhibit 319, Division 13, and see if it is not there stated that these bonds were bought December 8, 1893, by C. H. Van Deventer for R. F. Westcott?

A. It does so appear.

Q. Now, look for 10 more Lake Shore Seconds?

A. They appear on the receipt dated 11th October, 1897.

Q. Look at Complainant's Exhibit 319, Division 14, and see if it does not appear there that on January 10, 1894, those bonds were bought by C. H. Van Deventer for R. F. Westcott?

A. It does so appear.

Q. Look now for 5 New York Central bonds, and see if they appear on either receipt?

A. They appear on receipt dated 11th October, 1897.

Q. Look at Complainant's Exhibit 319, Division 14, and see if it is not there stated that these bonds were bought January 10, 1894, by C. H. Van Deventer for R. F. Westcott?

A. It does so appear.

Q. Look for 5 more Lake Shore bonds and see if they appear on either receipt?

A. They appear on receipt dated 11th October, 1897.

Q. Look at Complainant's Exhibit 319, Division 15, and see if it is not there stated these bonds were bought February 6, 1894, by C. H. Van Deventer for R. F. Westcott?

A. They so appear.

Q. Look for 10 New York Central bonds?

A. They appear on receipt dated 11th October, 1897.

Q. Look at Complainant's Exhibit 319, Division 15, and see if it does not appear there that these bonds were bought February 6, 15, and 16, 1894, by C. H. Van Deventer for R. F. Westcott?

A. They do so appear.

Q. Look for 20 New York, Lackawanna & Western bonds?

A. They appear on receipt dated 29th October, 1897.

Q. Look at Complainant's Exhibit 319, Division 18, and see if it is not there stated that these bonds were bought September 11, 1894, by Reed & Flagg for R. F. Westcott?

A. Yes, sir; they do so appear.

Q. Look for 6 M. United New Jersey bonds, see if they are on either receipt?

A. They appear on the receipt dated 29th October, 1897.

Q. Look at Complainant's Exhibit 319, Division 18, see if it is not there stated that these bonds were purchased September 11, 1894, by Reed & Flagg for R. F. Westcott?

A. It does so appear.

Q. Look for 4 United New Jersey bonds and see if you find those on either receipt?

A. They appear on receipt of 29th October, 1897.

Q. Look at Complainant's Exhibit 319, Division 19, and see if it is not there stated that these bonds were bought October 9, 1894, by Reed & Flagg for R. F. Westcott?

A. It does so appear.

Q. Look for 5 Joliet & Northern Indiana bonds and see if they are on either receipt?

A. They appear on receipt dated October 11, 1897.

Q. Look at Complainant's Exhibit 319, Division 19, and see if it is not there stated that these bonds were bought October 9, 1894, by Reed & Flagg for R. F. Westcott?

A. It does so appear.

Q. Look for 3 Morris & Essex bonds?

A. They appear on receipt dated 29th October, 1897.

Q. Look at Complainant's Exhibit 319, Division 19, and see if it is not there stated that these bonds were bought October 9, 1894, by Reed & Flagg for R. F. Westcott?

A. It does so appear.

Q. Look for 4 U. S. coupons 5s, and see if they were on either receipt?

A. They appear on the receipt dated 29th October, 1897.

Q. Look at Complainant's Exhibit 319, Division 19, and see if it is not there stated that these bonds were bought October 19, 1894, by Reed & Flagg for R. F. Westcott?

A. Yes, sir; it does so appear.

Q. Look for 12 U. S. coupon 5s besides those already mentioned, and see if they appear on either receipt?

A. Yes, sir; they appear on receipt dated 11th October, 1897.

Q. Look at Complainant's Exhibit 319, Division 20,

and see if it not there stated that these bonds were bought December 4, 1894, by Reed & Flagg for R. F. Westcott, 45 altogether?

A. Yes, sir; it does so appear.

Q. Of which these 12 were a part?

A. Yes, sir; it does so appear.

Q. The evidence shows that during the years, 1893, and 1894, Robert F. Westcott was in this country and attending to his own affairs, and that in January, 1895, he went to Europe, leaving with Captain Carter a written power of attorney authorizing Carter to both buy and sell bonds on Westcott's behalf. You have now referred to 15 M. bonds bought by Carter, have you not? I refer to the 5 Chesapeake & Ohio, the 5 Wabash Extension, and the 5 C., St. P., M. & O.?

A. Yes, sir; that is right.

Q. And you have referred to the following bonds bought by either Reed & Flagg or Van Deventer for Westcott, have you not?

10 Chicago & Northwestern,
10 Morris & Essex,
5 Chicago, St. Paul, Minneapolis & Omaha,
10 Chicago, Milwaukee & St. Paul,
10 Milwaukee, Lake Shore & Western,
30 Long Dock Bonds,
10 Delaware & Hudson bonds,
5 New Jersey Junction,
15 New York, Lackawanna & Western,
10 more New York, Lackawanna & Western,
5 Lake Shore & Michigan Southern,
10 Milwaukee & St. Paul,
10 more Lake Shore & Michigan Southern,
5 New York Central,
5 more Lake Shore & Michigan Southern,
10 more New York Central,
20 New York, Lackawanna & Western,
10 United New Jersey,
5 Joliet & Northern Indiana,
3 Morris & Essex, and
16 U. S. bonds?

A. Yes, sir.

Q. 10 of these bonds, namely, the Chicago & Northwestern, were bought in Carter's name, but Westcott gave a check to the purchaser for the amount of Carter's bonds?

A. Yes, sir; that is true.

Q. That leaves of the 285 bonds which Carter received from Westcott on October 11 and October 29, 1897, $56,000 bonds face value, does it not?

A. Yes, sir.

Q. Now, look and see if there is a one thousand dollar U. S. bond in either of those receipts, in addition to what you have already stated?

A. Yes, sir; there is.

Q. I call your attention to Complainant's Exhibit 319, Division 30, and ask you if it is not there stated that on December 22, 1896, Reed & Flagg bought for R. F. Westcott 10 U. S. coupon bonds, of which 9 were subsequently sold, leaving the one in question?

A. Yes, sir; it appears so.

Q. Mr. Westcott was in this country at that time attending to his own affairs, and the record shows that would leave $55,000 of bonds on these two receipts, would it not, which you have not already stated with regard to who purchased them?

A. Yes, sir.

Q. Now, Westcott left for Europe in January, 1895, and did not return till May, 1896, and while thus absent in Europe he gave and left Carter a written power of attorney to buy and sell bonds for him, Westcott. Now, look and see if you find 10 United New Jersey bonds on either of those receipts, in addition to what you have already had?

A. Yes, sir. On the receipt of 29th October, 1897.

Q. Look at Complainant's Exhibit 319, Division 24, and see if it is not there stated that these bonds were bought March 25, 1895, by Reed & Flagg for R. F. Westcott?

A. Yes, sir; it is stated so here.

Q. Now, look for 10 more United New Jerseys and see if you find them on either receipt?

A. On receipt 29th of October, 1897.

Q. For convenience, I will mention some other bonds at the same time, because they were bought about the same time; look for 5 more Delaware & Hudson bonds and see if you find them on either receipt?

A. Yes, sir; on receipt of 29th of October, 1897.

Q. Look for 5 more New York, Lackawanna & Western bonds?

A. Yes, sir; they appear on the receipt of 29th October, 1897.

Q. Look for 5 Chicago & Northwestern bonds?

A. They appear on the receipt of 29th October, 1897.

Q. That makes 25, doesn't it, this last item, 10 and three 5's?

A. Yes, sir; that is right.

Q. Look at Complainant's Exhibit 319, Division 25, and see if it is not there stated that these bonds were bought April 8, 9 and 10, 1895, by Reed & Flagg for R. F. Westcott?

A. Yes, sir; it is so stated.

Q. Look for 20 Long Dock bonds, in addition to the 30 we had awhile ago?

A. They appear on the receipt of 29th October, 1897.

Q. Look at Complainant's Exhibit 319, Division 27, and see if it is not there stated that these 20 Long Docks were bought June 7 and 17, 1895, by Reed & Flagg for R. F. Westcott?

A. That so appears.

Q. That completes the list, does it not, of the 285 M. of bonds upon those two receipts?

A. Yes. sir.

Q. It appears then that the bonds on these two receipts, does it not, that 15 M. of them were bought by Carter, and it appears by Defendants' Exhibit 96F that these 15 M. so bought by Carter were traded to Westcott on May 10, 1897, as part payment for the Orange real estate?

A. That is right.

Q. It appears that of the remaining bonds, 10 M. Chicago & Northwestern were bought in Carter's name and that Westcott gave a check to the broker for an amount more than sufficient to pay for those bonds at that time?

A. That is true.

Q. It appears, does it not, that all the remainder of the bonds included in those receipts were purchased by brokers for R. F. Westcott during Westcott's presence in this country, except $55,000 thereof?

A. Yes, sir.

Q. It appears, also does it not, that all the 55 M. of bonds which were purchased during Westcott's absence in Europe, were purchased under the written power of attorney by Westcott to Carter to buy and sell bonds and were purchased by brokers for and in the name of Robert F. Westcott?

A. That is true. * * *

Q. (Mr. Stone.) When books show that bonds are purchased in the name of R. F. Westcott the presumption is they were purchased for R. F. Westcott, is it not?

A. Yes, sir.

Q. You have now checked all the bonds and securities on the receipt of October 11, 1897, have you not?

A. Yes, sir.

Q. And you have checked 222 M. bonds off the receipt of October 29, 1897?

A. Yes, sir.

Q. And that comprises all the railroad and Government bonds on both receipts, does it not?

A. It does." (Rec., 7821-7834.)

For the testimony of Robert Nelson, concerning the methods adopted by Westcott to keep watch on his bank account, on which he gave Carter power of attorney in January, 1895, to buy bonds for him (Westcott), see (Rec., 7897-99; 7901-02).

If any man was likely to know whether Westcott was investing his own money in 1893 it would be his confidential attorney. That attorney testifies that in 1893 Westcott seriously considered investing large sums in real estate, but finally decided not to invest in real estate, and (as the record shows) bought the bonds in controversy. That Westcott was making those investments for himself is shown by the following testimony:

E. Luther Hamilton, Westcott's confidential attorney, testifies:

"Q. Did you ever know Robert F. Westcott?

A. I did.

Q. During what period?

A. From about 1891 to the time of his death.

Q. What were your relations with him during that period?

A. I was his legal adviser for a great part of that period. I was on friendly, social, intimate terms with him and his family.

Q. Did Mr. Westcott make any statement to you during the year 1893 with regard to purchases of real estate?

A. He did, frequently." (Rec., 4683.)

"A. * * * It is about either in the latter part of 1892 or early in 1893, and continued for several months. He came to my office, which he was in the habit of doing several times a week for several years, and told me that

he had got tired of some of his investments, and had a lot of money lying idle that he thought he would invest in West Side property, and he wanted me to look around and see if I could find purchasable, suitable pieces of property. * * * There was quite a large number of pieces examined by me, some of them very high priced property. I remember one piece on the corner, the southeast corner of 39th street and 5th avenue, opposite the Union League Club Building. I forget what the value of it was, but certainly it was upward of a hundred or a hundred and and fifty thousand dollars." (Rec., 4683.)

"A. There were other houses and other pieces of land that we looked at, I suppose perhaps a dozen altogether, and all of them were rejected for one reason or another." (Rec., 4684.)

"Q. What, if anything, was said by him at the time with regard to whom those investments or purchases were for?

A. For himself, with the intention of putting the property in his wife's name.

Q. All for himself?

A. All for himself." (Rec., 4684.)

In May, 1893, Mr. Westcott bought for himself a piece of property in New York, for $29,500, to be paid for with some of the very money which is now in question.

J. H. JUDGE, an attorney of New York, testifies concerning that purchase, and the reason why the purchase was not finally consummated:

"Q. Did you know Robert F. Westcott in his lifetime?

A. Yes.

Q. Did you have any transactions with him during the year 1893?

A. Yes." (Rec., 4679.)

"A. I was appointed referee in the partition action in the Supreme Court, *Charles Remsen* v. *William A. Reese, et al.*, Supreme Court of New York, for the purpose of selling the property which was directed to be sold. * * * Mr. Westcott bid $29,500, and it was knocked down to him." (Rec., 4679-80.)

"A. * * * He gave me a check to my order at that time for 10%—$2,950. * * * He subsequently called at my office and said he thought he had made a

mistake in purchasing this stable; that he was going to get out of it; and asked me how he could get out of it." (Rec., 4680.)

"A. I told him that there was no way that I knew of, except some lawyer might find some trouble with the partition suit." (Rec., 4680.)

"A. * * * He said he had some money to invest that was loose, and he took this flyer, and he thought he had made a mistake." (Rec., 4681.)

"A. I told him I thought he had not made any mistake, as the price paid was a fair one." (Rec., 4681.)

Mr. JUDGE testifies concerning the attempted consummation of the purchase by Mr. Westcott:

"A. He came in with Mr. Hamilton, according to the terms of sale on his part, to close up the transaction, and he either had the cash or a certified check. My impression is it was a certified check to my order; * * * but as there was a tenant in the property then, I could not deliver him the property. * * * He offered me the check if I would give him possession. I said I could not do so. * * * So he did not give me the check." (Rec., 4682.)

"Q. Did Mr. Westcott say anything to you with regard to what he was buying this property for?

A. No, he was buying it for himself." (Rec., 4681.)

For Johnson's claim that this money belonged Carter, see Request for Findings, No. 27-b.

CHARLES H. VAN DEVENTER, a witness for the complainant, who was Westcott's broker, and former business partner (Rec., 5469), testifies as follows with respect to the bonds purchased by Westcott, which Westcott gave to Carter in October, 1897:

"Q. Mr. Van Deventer, in the purchase of these bonds which are set out in exhibit 232, under the head of transactions 'in the name of R. F. Westcott,' you only knew Mr. Westcott in those transactions?

A. I never knew they were bought for anybody but Mr. Westcott; and they were delivered to him, and not to anyone else." (Rec., 11043.)

J. H. REED, a witness for the complainant, and the broker of Westcott through whom about two-thirds (Wy. 1862) of the bonds in question were purchased (some of them by Carter as Westcott's attorney), testifies:

"A. I have been acquainted with Robert F. Westcott

since 1860, '59 or '60; during the last 15 or 20 years very intimately. There could be no greater intimacy between any two families than existed between mine and his. I think I may say I was his confidential friend. When Captain Carter married Miss Westcott, my granddaughter, who has always lived with me, was bridesmaid. From that time onward Mr. Westcott always spoke to me of Captain Carter as his son for whom he had great admiration and in whom he had unlimited confidence. That confidence was expressed by some business which was done by Captain Carter acting merely as a messenger, as it were, or representative, prior to 1895, when Mr. Westcott went abroad. To confirm what I say about intimacy, Mr. Westcott urged me to go with him abroad. I could not go. Mr. Westcott then informed me that he wished Captain Carter to represent him during his absence, and expressed to me and to my firm unbounded confidence in Captain Carter's loyalty to him, his integrity, and stated that he would do everything for him as if he were here himself. Now, those facts that I have just stated indicate to you how the relations existed between myself and Mr. Westcott and Captain Carter as his representative.

Now, then, the business of my firm that was transacted with Captain Carter was always considered by my firm as Mr. Westcott's business. He was always considered simply as Mr. Westcott's representative. I ask your indulgence because I want to give you thoughts that occur to myself. Suppose Captain Carter had been Mr. Westcott's own son, I could not have looked upon him more as a representative of Mr. Westcott than I did." (Rec., 888-89.)

"A. * * * I never did from the first to the last any business with Captain Carter that I did not understand to be as the representative of his father-in-law, Robert F. Westcott, from the beginning to the end." (Rec., 889.)

"A. * * * When a man introduces his son to me and says, 'He will do by buisness,' there is no question about it at all. We had no reason to question it. There was no doubt about it in our minds. Captain Carter comes in and discusses various securities, raised the question—asked me perhaps—whether I think these stocks are in accord with Mr. Westcott's views. I said I have no doubt; I have known them for years; they are all right." (Rec., 897-98.)

"A. * * * I understood it to be Mr. Westcott's money. I never had any doubt about it." (Rec., 898.)

"Q. Mr. Reed, when Mr. Westcott was absent in Europe and Captain Carter brought in large sums in bills to make purchases, did you suppose that money belonged to Mr. Westcott?

A. I never had any doubt about it and I don't see why I should have doubted it, when Mr. Westcott had done the same thing before he went away. It is perfectly clear to me." (Rec., 899-900.)

This testimony of Reed was taken secretly by the Board of Engineers, and was suppressed from 1897 to about 1904, when Carter's present counsel obtained it. (Rec., 6486-90.)

W. H. Flagg, a broker of New York, and the business partner of Mr. J. H. Reed (Rec., 2375), testifies as a witness for the complainant:

"Q. You have bought and sold stocks for Mr. Westcott during a great number of years?

A. Yes, sir." (Rec., 2381.)

"Q. Is it not true that for two or three years preceding that time (the panic of 1893) large amounts of cash money were hoarded in safe deposit banks and other places, and taken from the banks?

A. I believe so.

Q. That you know through the course of your business?

A. I do." (Rec., 2384.)

Mr. Flagg testifies concerning the business which Captain Carter, as Mr. Westcott's attorney, had transacted with his firm:

"A. It was the business of Mr. Westcott invariably.

Q. How do you know it was the business of Mr. Westcott?

A. Simply because he acknowledge it afterwards." (Rec., 2379.)

The Witness: "Mr. Westcott came to us at the outset and introduced Captain Carter, saying that he was his son-in-law, in whom he had implicit confidence, and that he had given him full power of attorney to transact all his business, and that we were to recognize him in his stead, and do any business for his account that Captain Carter said." (Rec., 2380.)

ROBERT E. WESTCOTT, Robert F. Westcott's son, testifies:

"Q. Your father is a wealthy man, is he not?

A. Yes, sir." (Rec., 3290.)

"Q. What were his relations with Captain Carter?

A. Captain Carter attended to his business when he has been away.

Q. Have you ever heard him express anything with regard to his confidence in Captain Carter?

A. He trusted him, implicitly. * * * I have heard him say that, yes." (Rec., 3291.)

In May, 1893, a few days after Westcott gave Carter the check for $489.86 to balance Carter's wife's estate (Rec., 6646), there is copied in Carter's letter book a list of certain bonds and what interest they paid. (Rec., 8937.) This list was evidently one which had been under consideration when the estate of Carter's wife was invested in bonds, just before that time. Since Carter's letter book was seized, and has been in Johnson's possession for several years, somebody has made pencil memoranda on that list in Carter's letter book, calculated to support Johnson's theory of the case. The record shows those memoranda were not put there by Carter. (Rec., 8937.)

In the periodical accountings between Westcott and Carter, such coupons (from the bonds which Westcott gave to Carter on October 11 and 29, 1897) as Westcott gave to Carter from time to time, were charged against Carter's allowance by Westcott, thus proving the bonds from which those coupons came to have been Westcott's bonds. For the evidence in support of this, see Reference No. 33.

—26—

EDWARD I. JOHNSON.

The evidence which proves the statements made in relation to Johnson, has already been referred to in Request No. 26, and need not be repeated here.

—27—

JOHNSON'S EXHIBIT 319.

The evidence which proves the statements concerning Johnson's Exhibit 319 has already been given (by references and quotations) in Requests Nos. 27 and 30, and need not be repeated here.

Complainant's solicitor, in cross-examining Carter, introduced various tables of figures into his questions, which he evidently intended to use in argument for the purpose of trying to make it appear that Carter and not Westcott owned the securities in court.

He refused to introduce those "compilations" in evidence, the record showing:

"Mr. Stone: Do you expect to introduce that in evidence?

Mr. Erwin: No, it is merely a compilation." (Rec., 6262.)

By reading his "compilations" into his questions to Carter, he evidently intended to *argue* that Carter assented to their correctness, although he was very careful not to permit Carter to testify concerning them. (Rec., 7795-96.)

The "compilations" of Mr. Erwin just referred to are evidently all based on Johnson's Exhibit 319, hence it is not necessary to consider them further.

—28—

JOHNSON'S EXHIBIT 589.

The evidence which proves the statements concerning Johnson's Exhibit 589 has already been given (by references and quotations) in Requests Nos. 28 and 30, and need not be repeated here.

A correct statement of what is known as the "attorney account," *i. e.*, the account of Carter as attorney for Westcoee in 1895 and 1896, is Defendant's Exhibit 96-E.

The general power of attorney from Westcott to Carter, directing Carter "to buy bonds" for Westcott, is Complainant's Exhibit 271.

The bank power of attorney from Westcott to Carter, giving Carter power to sign Westcott's name to checks against Westcott's bank account, so that Carter might pay for the bonds he bought for Westcott, is Complainant's Exhibit 270.

For evidence that Westcott went to Europe in January, 1895, and returned in May, 1896, see (Rec., 8367; 7208; 7213; 7231; 7237).

For evidence that Westcott received money at the New York Central offices in January, 1895, and left it with Carter to invest, see (Rec., 7217-20; 5729).

It was not unusual for Westcott to have $150,000 in currency, as the record shows that in September, October, Novem-

ber and December, 1894, Westcott himself deposited over $195,000 in currency. (Rec., 6429; based on Ex. 319.)

For the evidence that Carter (under his power of attorney) bought 55 bonds for Westcott, see Reference No. 25.

For evidence that Solley acted as Westcott's agent, etc., see (Rec., 5362; 5584; 5596; 7557).

For evidence as to the manner in which Carter kept his account on Westcott's stub check book (described in Request 28) see (Rec., 5599-5609; 5755).

Charles McPherson and Robert Nelson, expert accountants, both testify the account was Westcott's, and that it was kept as Carter says it was.

They also testify that Carter's account, as set forth in Defendant's Exhibit (Rec., 9592-9603) is correct.

CHARLES MCPHERSON testifies:

"Q. Taking that Defendants' Exhibit 96-E into consideration, taking into consideration the fact that the Government has had possession of this check book throughout this whole matter, and got possession of it before this trouble commenced, and before Carter had any chance to fix it up, taking all these other things into consideration in regard to the fact that the book itself explains almost every transaction of any importance, *would you, as an expert accountant, consider that Defendants' Exhibit 96-E is a thoroughly reliable statement of the transactions?*

A. *I would, yes, sir.*

Q. It is a frank and honest statement, is it not, in cases where no evidence is found, that no evidence can be found?

A. It is a statement of that, yes, sir.

Q. And it is a frank and honest statement where the information that is not shown by the book is obtained from Carter's diary, that it came from there, is it not?

A. Yes, sir.

Q. So that if the court were looking at Defendants' Exhibit 96-E he would not be deceived as to any item in it, would he?

A. He would not.

Q. And there was no effort where there was no explanation excepting Carter's diary, to conceal the fact that that is where the explanation came from, and if there was no explanation at all, it would give that fact, would it not?

A. Yes, sir.

Q. That Defendants' Exhibit 96-E is entirely consistent with the check book in the possession of the Government, isn't it?

A. It is.

Q. *Now, as an expert accountant, was the method pursued by Captain Carter, the method that he states was pursued, namely, to put in the column "A" and "C" the transactions over which he had charge, and put in the column "B" and "W" transactions over which he did not have charge, a proper and fair method of keeping that account?*

A. *It was for the purposes for which he says he kept it.*

Q. *It was not a suspicious or an unusual method of keeping it, was it?*

A. *It was not.*

Q. In fact it was for the purposes for which it was kept, and in order to determine how much he had charge of and how much he did not have charge of, it was a very proper and lucid way of keeping it, was it not?

A. It was a proper manner; in order to say that it is lucid, it is necessary to figure out what items are in the account. It is lucid to any one who examines it carefully.

Q. That is to say, he made a memorandum in the book there, on some of the stubs, that the balance in the bank at that time consisted of so much and that certain transactions occurred in the bank of which he had charge, and the balance found in the bank consisted of so much which was made up of transactions in that account of which he did not have charge?

A. Yes, sir.

Q. And anyone who examines the account to see if it is correct, would ascertain the whole thing without any difficulty, would he not, if he were an expert accountant?

A. Yes, sir.

Q. You have gone over this check book of Carter, attorney, which has been in the possession of the Government for all these years and you have gone over the items registered on the backs of those stubs, and you have looked over the transactions represented by the memoranda on the backs of those stubs, have you not?

A. Yes, sir.

Q. Do you find anywhere, throughout, suspicious circumstances, or anything to indicate that there was anything about that account that does not appear upon its face?

A. There is nothing suspicious about it. Of course the mere setting down of the balances does not indicate all the particular items that are in these balances.

Q. I mean as to whether it was Westcott's account, or whether it was being used as a 'fence' for same illegitimate transaction of Carter's?

A. There is nothing to indicate that it was not Westcott's account. It does appear that a few of Captain Carter's personal transactions appeared in that account.

Q. It appears also, does it not, that during that period he had more or less of his transactions in that account instead of putting them in his own account, that he did it as a matter of convenience?

A. Yes, sir.

Q. Is there the slightest indication about that check book, or the transactions which indicate that Carter was using that account either for his own benefit, or as a 'fence' or in any illegitimate transactions?

A. There is not; there is no indication that he was using it for his own account, except as to the matters which are admittedly his own matters.

Q. You spoke of the small items which belong to him?

A. Yes, sir.

Q. Is there any indication that he used it as a convenience for any other transaction?

A. There is not." (Rec., 7739-42.)

Robert Nelson testifies:

"Q. Now I call your attention to Complainant's Exhibit 589, which relates to transactions which Carter performed as attorney for Robert F. Westcott while Westcott was absent in Europe, from January, 1895, to May, 1896. Captain Carter testifies that he performed certain transactions for Robert F. Westcott during Westcott's absence in Europe, during that period; that he made certain deposits in the Union Trust Company to Westcott's credit and that, as attorney for Westcott, he made certain checks against that account, and that at the same time Westcott had another agent by the name of Solley, who lived in Westcott's house and who was the father

of the husband of one of Westcott's daughters and that Solley collected more or less rents and other matters for Westcott which he deposited in the same account in the Union Trust Company. It appears that when deposits were made by Solley that Carter was notified by letter; it also appears that Solley had no authority to check against the account, and hence all the checks against the account were either made by Carter, as attorney for Westcott, or by Westcott himself. Carter testifies that he had a check book and that he kept account of the deposits in the bank on the stub of that check book, and that about once in so often he figured out how much was in the bank and figured out how much of that balance in the bank was the result of transactions over which he had charge for Westcott, and figured out how much of the balance was the result of transactions over which he did not have charge, namely, those over which Solley had charge, or a few transactions where Westcott had ordered Carter to pay certain money to Westcott's relatives. He testifies that he designtaed that part of the business over which he had charge under letters 'A' and 'C' and that he designated that part over which he did not have charge under the letters 'B' and 'W,' and that he did this for the purpose of keeping track of what he was responsible for and of keeping track of what he was not responsible for; that along just before Mr. Westcott returned he figured up and found that he had paid out or invested for Westcott or otherwise an amount of money which was $188.44 more than there was left of what was in the bank arising from transactions over which he had had charge; or in other words that he had encroached upon the money in the bank which Solley had deposited, etc., to that extent, and hence that he gave his check on his own bank account for that amount so as to leave in the bank the exact amount of money which Westcott's other agent had placed there, less what had been disbursed out of it, and that then, after Westcott returned, he accounted to Westcott for the transactions which he had performed for Westcott and left the other agent, Solley, to account to Westcott on his own behalf. Now I will ask you, as an expert accountant, to examine this stub check book here and state whether or not that manner of keeping the accounts was a fair and honest one, if the accounts were kept as Carter states they were.

A. *Yes, sir, they appear to kept as he states they were.*

Q. Was there anything wrong or suspicious, so far as your experience as an expert account goes, in keeping the accounts in that way?

A. No. It might have been as good a way as any, if he kept them in the stub of a check book and he wanted to make the distinction that Captain Carter testified he wanted to make.

Q. *Could an honest and an innocent man keep an account in that kind of a way without being subject to criticism?*

A. *Most certainly.*" (Rec., 7888-90.)

For evidence that when Westcott went to Europe he left money with Carter to invest for him (Westcott) and that when Westcott returned from Europe Carter turned over to Westcott what he had bought for Westcott, see (Wy., 619-22; 633-34; 891).

Charles McPherson and Robert Nelson, expert accountants, both testify that Defendant's Exhibit 96-E, (which shows that the securities Carter bought under his power of attorney belonged to Westcott) *is correct,* and that Johnson's Exhibit 589 is *incorrect.*

That testimony (which is in detail) is lengthy, and as it has already been printed, it need not be reprinted here.

For the testimony of Charles McPherson, see (Rec., 7713-27; 7730-32; 7735-40).

For the testimony of Robert Nelson, see (Rec., 90-93; 7895-97).

Not only did the money (which Carter invested under Westcott's orders) belong to Westcott, but Westcott actually left J. B. Solley to watch Carter, without Carter's knowing it, so that he (Westcott) might know every transaction Carter made.

The details of this matter are found in the printed volume of McPherson's testimony (Rec., 7513-15; 7523; 7524; 7547-83; 7711).

For the testimony of Robert Nelson on this same subject see (Rec., 7897-99; 7901-02).

Westcott's check stub books covering the critical period when he left for Europe, have been mutilated and false entries made therein.

The details of this are to be found in McPherson's testimony. (Rec., 4257; 7439-51).

In Exhibit 590, at page 13, Johnson expresses the "opin-

ion" that before Westcott went to Europe in January, 1895, he borrowed $10,000 from Carter, in addition to $14,204.36 which Johnson says Westcott already owed Carter. This alleged $10,000 loan is designated by Johnson as "Special Loan," and Johnson states it was unpaid when Westcott returned from Europe May 11, 1896.

In Exhibit 319, division 22, Johnson states the alleged $10,000 loan was secured by the following mortgage notes; Wm. B. Adams, $3,000; Mrs. Zadie Grant, $3,000, and Mrs. Julia Zippel, $4,000; and that the loan was repaid August 20, 1896, by check for $10,000 on the Union Trust Co.

The statement that Westcott delivered to Carter mortgage notes amounting to $10,000 to secure the payment of a loan of $10,000 is untrue, and must have been known by Johnson to be untrue when it was made.

The Zadie Grant mortgage was a $3,600 mortgage instead of a $3,000 mortgage, as stated by Johnson. In May, 1896, $600 of the principal of the Grant mortgage was paid (See Complainants' Ex. 589, p. 26), and in July, 1896, Carter wrote a letter to the mortgagor calling attention to the fact that there was still due upon the mortgage $3,000. In Exhibit 319, division 22, Johnson refers to that letter to the mortgagor as evidence supporting his statement that the Grant mortgage was a $3,000 mortgage at the time of the alleged loan of $10,000 "just before Westcott's departure for Europe," although he had stated in Exhibit 589 that $600 of the principal of that mortgage had been collected in May, 1896, *i. e.*, between the time of the alleged loan of $10,000 and Carter's letter to the mortgagor (in which the unpaid principal of the mortgage was stated to be $3,000).

In other words, Johnson states (in Exhibit 319) that the Grant mortgage was a $3,000 mortgage "just before Westcott's departure for Europe," although the Government exhibits show that it was a $3,600 mortgage at that time.

Not only has Johnson misrepresented the amount of the Grant mortgage, but he omitted entirely any reference to the Dobbs' mortgage of $2,000, which was left by Westcott with Carter, and which (as shown by Exhibit 589, at page 4) was collected by Carter, April 9, 1895.

Moreover, Johnson alleges that Westcott left the Zippel mortgage of $4,000 as part security for the alleged $10,000 loan; but the evidence introduced by the complainant shows that the Zippel mortgage did not belong to Westcott at all, but to Mrs. Westcott. (Rec., 5141.)

That the so-called "Special Loan" of $10,000, with mortgage notes as collateral security, is a mere invention is further shown by the fact that although Carter collected a part of the principal of the mortgages alleged to have been held as collateral security, those collections did not reduce the amount of the alleged loan, for Johnson says the full loan of $10,000 was repaid in August, 1896.

For the testimony as to the alleged $10,000 loan (which was invented by Johnson) see (Rec., 7067-81; 7594; 7600).

Among other securities purchased by Carter for Westcott (under the power of attorney) were some Lackawanna and some Delaware and Hudson stock, known as the "coal stocks."

As Carter expected he might have to sell those stocks before Westcott returned, and as he had no duplicate power of attorney to attach to those stock certificates, he had the stocks put in his own name for facility of transfer. For details concerning that matter, see (Rec., 5698-99).

That circumstance is now urged as proof that those stocks really belonged to Carter, but there is abundant evidence showing that suspicion to be unjustified.

Mr. J. H. Reed and Mr. W. H. Flagg, Westcott's brokers, who bought those stocks, and Mr. R. W. Tailer, Westcott's intimate friend, all testify that Westcott stated he owned those stocks, and Reed and Flagg testify that Westcott said he was displeased with Carter for purchasing them.

W. H. Flagg testifies concerning the purchase of those coal stocks (referred to in Johnson's Exhibit 319, Division 28), which the complainant now claims were Captain Carter's:

"Q. What did Mr. Westcott say to you about this purchase, in your interview, if he said anything?

A. He called my attention to the fact that Captain Carter had bought the stock, and said he didn't approve of it, because he wanted bonds bought; he said we ought not to have advised Captain Carter to buy such stock; and we said we did not give advice to any one in such purchases, that we simply consulted;—I think Captain Carter asked if we thought the stocks were good ones and likely to be approved by Mr. Westcott, and I undoubtedly answered, 'yes, they were good stocks.'

Q. Mr. Westcott, then, did not approve of the purchase; that is to say, he condemned the purchase?

A. He disapproved of it.

Q. He, nevertheless, ratified the purchase?
A. Oh, yes, sir.
Q. Did Captain Carter, so far as you know, ever have for himself any money transaction with your firm?
A. He never did." (Rec., 2385-86.)
"Q. Didn't you sell the stocks later on?
A. That was for account of Mr. Westcott, a portion of it.
Q. You sold the stock?
A. A portion of it.
Q. And paid the money to whom?
A. Mr. Westcott.
Q. Didn't pay it to Captain Carter?
A. Never." (Rec., 2383.)

Flagg testifies concerning Carter's reason for making that purchase of stock for Westcott as follows:

"Q. What did Captain Carter say?
A. That he had been up to that time buying a high class of bonds that did not pay very well, and that he thought possibly these stocks would answer Mr. Westcott's purposes, and he thought it a good thing to depart from that course and buy these stocks that would pay more income." (Rec., 2379-80.)

J. H. Reed testifies concerning those coal stocks:

"I understood it to be Mr. Westcott's money, I never had any doubt about it." (Rec., 898.)

The Witness: "When a man introduces his son to me and says 'he will do my business,' there is no question about it at all. We had no reason to question it. There was no doubt about it in our minds. Captain Carter comes in and discusses various securities, raised the question—asked me, perhaps—*whether I think those stocks are in accord with Mr. Westcott's views.* I said '*I* have no doubt; I have known them for years, they are all right.'" (Rec., 897-98.)

The Witness: "I never did from the first to the last any business with Captain Carter that I did not understand to be as the representative of his father-in-law, Robert F. Westcott, from the beginning to the end. (Rec., 889.)

When questioned further concerning the Lackawanna stock, Mr. Reed replied:

"That stock went to Mr. Westcott to my certain knowledge." (Rec., 894.)

Reed and Flagg both testify concerning the transactions covered by the account relating to the purchase of those coal stocks:

> *"The transactions covered by that account, as well as all other transactions, were for Mr. Westcott, understood by us so at the time. The stock was placed in your name solely for the purpose of the convenience of transfer during the absence of Mr. Westcott."* (Def. Ex. 92.)

Robert W. Tailer testifies he has known Robert F. Westcott "between twelve and fifteen years, intimately." (C. M. Ex. 438.) Tailer further testifies:

> "Mr. Westcott * * * said that he had given, in his absence, Captain Carter a power of attorney, and he had bought for his account some coal stocks. * * * Mr. Westcott told me that the stocks were bought by Captain Carter under his power of attorney, * * * *and that he had given Captain Carter the order to buy them,* and *therefore it must have been with Mr. Westcott's money.* Mr. Westcott did not express himself, satisfied or dissatisfied, but he did say they had declined a little." (C. M. Ex. 438.)

For evidence that Carter never received any of the income from those coal stocks, save such as Westcott charged up against him as part of his allowance, see (Rec., 7777).

Robert Nelson testifies it was both desirable and proper for that stock to have been issued in Carter's name, under the circumstances attending its purchase for Westcott, saying:

> "Q. What next do you find on the receipt of October 29, 1897?
>
> A. Two certificates for 100 shares each of the capital stock in the Delaware & Hudson Canal Company, Nos. 25,868 and 25,869.
>
> Q. I call your attention to Complainant's Exhibit 319, Division 28, and ask you if it is not there stated that that stock was bought October 8, 1895, by Reed & Flagg in the name of O. M. Carter?
>
> A. That is so stated here.
>
> Q. Captain Carter has testified that that stock was bought in his name, although in fact he bought it for R. F. Westcott, so that it might be sold without putting with it the power of attorney which Westcott had given him; or in other words if he had bought it in Westcott's

name, it would have been necessary when it was sold to have attached his power of attorney to the stock in order to show that he had authority to sign Westcott's name to the transfer of the stock? Have you had any experience in such matters, or have you been familiar with transactions of that kind, so as to know whether that was an ordinary business transaction?

A. Yes, I have had a good deal of experience in regard to transfer of stocks, and I have often seen stocks taken out in the name of a man representing the actual purchaser, so that the man who has the power of attorney could sign the stock and transfer it without having to produce his power of attorney.

Q. Usually the companies do not like to have powers of attorney produced in transactions in stock?

A. That is true.

Q. Then that would be not only an ordinary business transaction, but one that would commend itself to the company rather than to have the power of attorney, would it?

A. Yes, sir." (Rec., 7834-35.)

—29—

JOHNSON'S EXHIBIT 590.

The evidence which proves the statements made in relation to Johnson's Exhibit 590 has already been quoted or referred to in Requests Nos. 29 and 30, and need not be repeated here.

For the evidence that Johnson's Exhibit 590 (which purports to be a continuous accounting between Westcott and Carter) is *not* correct, and that Carter's statements of account (which are Defendant's Exhibits 96-A, 96-B, 96-C, 96-D and 96-F) are correct, see Reference No. 33.

—30—

MCPHERSON AND NELSON.

The statements hereunder consist almost entirely of quotations from the testimony of McPherson and Nelson, and as those have already been referred to in Request No. 30, the reference to such testimony need not be repeated here.

—31—

JOHNSON'S DIVISION No. 32.

For evidence that none of the securities in court was purchased with moneys coming from the 1896 contracts, see (Rec., 7299-7319).

As to the alleged advance of $50,000 by Carter or Westcott towards the 1896 contracts, the record shows that the check for $1,000 by Carter to Greene, December 9, 1896, was to pay a woman. (Rec., 5720; 6248; 632.)

The other $49,000 was simply borrowed by Greene from Westcott.

This entire matter was gone over in detail in the examination of Mr. McPherson, who had before him the checks, accounts, etc.

CHARLES MCPHERSON testifies:

"Q. In other words, the evidence as you have already stated shows that the $49,000 was borrowed from Westcott by Greene?

A. Yes, sir.

Q. And part or all of it used by Greene towards paying his, Greene's, share towards starting that work?

A. Yes, sir.

Q. *And that it was not money advanced by either Westcott or Carter as partners or in any sense sharers in the contract?*

* * * * *

A. *There is no evidence that it was advanced by Westcott or Carter as partners in the venture.*" (Rec., 7296.)

The Witness: "The net result from all of Mr. Johnson's figures, up to May 10, 1897, is that Greene contributed from his own funds $10,350, and that he obtained the remaining $49,000 from Westcott.

Q. That is, he put in $59,000, of which he borrowed $49,000 from Westcott, is that it?

A. He put in $59,000, and borrowed $49,000 during that period from Westcott. Whether the money he borrowed from Westcott was put into the work, does not appear." (Rec., 7313.)

Complainant's "expert", Edward I. Johnson, expresses the "opinion" that Carter was entitled to profits of $156,766.67 on the 1896 contracts; and he expresses the further "opinion" that this is represented by 130 United States bonds, bought by B. D. Greene, "or by cash in Greene's bank account." To

sustain that opinion, he says "actual amount left in Greene's account $342,591.61." (Ex. 319; Div. 32.)

As matter of fact the actual amount in Greene's account was less than $25,000.

CHARLES MCPHERSON testifies:

"Q. I note over to the right hand side of this Division 32, and down at the bottom, a statement there as to the value of the securities turned over by Westcott to Carter on October 11, 1897, and October 29, 1897, at cost price $414,437.50, is that correct?

A. Yes, sir.

Q. To which Mr. Johnson has added: 'Other investments in the Cunningham note, with Brewing and Tow boat stock, the Eighth Avenue property and the Orange, New Jersey, property,' which he calls $135,534.01'; is that correct?

A. Yes, sir.

Q. Then he has added $29,000, being the difference between what Greene borrowed from Westcott and the $21,000 check which Mr. Johnson shows repaid part of it; is that correct, that he has so added it?

A. He has so added it; yes, sir.

Q. Upon what theory does he add that, if you can tell?

A. I assume that it is on the theory that Westcott had made the advancements to Greene for Carter's benefit.

Q. Well, we have gone all over that, haven't we?

A. Yes, sir.

Q. And it appears that he did not make it for Carter's benefit, but made it on his own account?

A. Yes, sir; it appears further that he advanced only the $49,000, instead of the $50,000, as here stated.

Q. The other $1,000 is the $1,000 which Carter sent to Greene to give to the woman, isn't it?

A. Yes, sir.

Q. That is the way he makes up the $50,000?

A. Yes, sir; but then on his theory, Westcott would not be entitled to credit for that.

Q. The $1,000 went from Carter to Greene, didn't it?

A. Yes, sir.

Q. Then he has added on what he calls the last division $126,766.67, hasn't he?

A. Yes, sir.

Q. And the total is $705,738.18, isn't it?

A. It is.

Q. That is the way he arrives at this amount so frequently mentioned in the newspapers, is it not, about $700,000 of boodle that Carter got?

A. That is the way he arrived at that amount of $700,000; yes, sir.

Q. He says here below that: 'Advanced by Carter as above $50,000,' meaning the $49,000 that Westcott loaned to Greene and the $1,000 that Carter sent to give to the woman, don't it?

A. Yes, sir.

Q. He says: 'Less returned proceeds of bonds $21,000'; that is not a correct statement of what those bonds sold for, is it?

A. It is not.

Q. What amount did they sell for?

A. $22,700.

Q. He adds this $29,000 difference to the last division $126,766.67 and produces $156,766.67, doesn't he?

A. He produces $155,766.67.

Q. Now, he admits, doesn't he, that Carter did not get that money?

A. Yes, sir.

Q. But he says that it is possible that that is represented by the $130,000 of bonds, or by cash in Greene's bank account, don't he?

A. Yes, sir.

Q. If it appears that Greene sold those bonds, that would indicate Carter was not the owner of the bonds, wouldn't it?

A. It would.

Q. If it appears that Greene checked practically all the money out of this bank account, it would appear it was not in his bank account, would it not?

A. It would.

Q. As a matter of fact, you called attention yesterday, did you not, that in making up the memorandum as to Greene's bank account, that Mr. Johnson omitted a check of $125,400, didn't he?

A. He omitted a debit which appears in the bank statement amounting to $125,400, which would represent that amount drawn out by one or more checks or otherwise.

Q. And he omitted the cost of these bonds, too, didn't he, in figuring up how much Greene had left in his bank account?

A. Yes, sir; he did.

Q. How much is the amount of that?

A. $172,500.

Q. Then in this statement in regard to Greene's bank account, Mr. Johnson is a little bit off, isn't he, by omitting the $125,000 and the $172,000?

A. The bank statement shows that he could not possibly have had these things in his bank account at the time this Exhibit 319 was made.

Q. He did not have in his bank account at the end of July, 1897, as much as $25,000, did he?

A. He did not.

Q. This statement of Mr. Johnson's was made up long since then, wasn't it?

A. I assume that on Exhibit 319, complainant's accountant is referring to the bank account in evidence. There is nothing to show that Greene could have any such funds in his bank account, on any account in evidence, and there is evidence to show that he could not have had it in the bank account.

Q. Well, all this money under Division 32 went into Greene's bank account in the Knickerbocker Trust Company in July, 1897, didn't it?

A. It did; yes, sir.

Q. And that is the only bank account to which any reference has been made in regard to this?

A. Yes, sir.

Q. And at the end of the same month, July, 1897, Greene did not have $25,000 left in that bank account, did he?

A. He did not.

Q. And hence any statement by Mr. Johnson that the actual amount left in Greene's account is $342,591.61 is more than $300,000 out of the way, isn't it, if you consider the account of Greene for the month of July, 1897?

A. Yes, sir.

Q. Any statement made here that this $156,000 which Johnson says Carter ought to have got from Greene, as in Greene's bank account, is likewise $130,000 out of the way, if it refers to Greene's bank account for the month of July, 1897, isn't it?

A. Yes, sir.

Q. If it appears that Greene sold those 130 U. S. bonds, it is entirely out of the way, so far as those bonds are concerned, isn't it?

A. It is; yes, sir." (Rec., 7314-18.)

ROBERT NELSON testifies:

"Q. (Mr. Stone.) I call your attention to Complainant's Exhibit 319, Division 32, to the final wind up item on the left hand side of that page, and ask you what this states?

A. It says, 'Actual amount left in Greene's account $342,591.61.'

Q. I will ask you to state the latest date that appears above that, showing what date is meant by this down at the bottom here, that is to say, what transactions it covers. It appears to be a statement of certain transactions; now, what is the latest date of any transactions that appear to be covered by this balance?

A. It appears to me the latest date in that sheet, so far as I can see there, is the 10th of August, 1897.

Q. There is a date here of August 6, 1897, is there any that appears to be included in the items that precede this balance that is struck down at the bottom?

A. Yes, sir.

Q. Look at the account of Greene in the Knickerbocker Trust Company, this is the one referred to, and see what balance Greene had, we will say, the 31st of July, 1897?

A. He had $24,268.66.

Q. See if this check here of $125,400 had been deducted in order to produce that balance they have given on that paper?

A. That item of $125,400 does not seem to be on this sheet, at all, so far as I can see at present.

Q. Is the item of $173,050 under date of July 8th deducted out before that balance is struck?

A. There is no specific item of $173,050; no, sir.

Q. This sheet shows, does it not, that on July 6, 1897, Greene deposited with the Knickerbocker Trust Company $575,749.90?

A. Yes, sir; that is so.

Q. Now, Mr. Johnson has deducted from that $30,749.90?

A. He has.

Q. Leaving $545,000?

A. That is true.

Q. That don't deduct that $125,400 check, does it?

A. No, sir.

Q. Nor does it deduct the $173,050 check?

A. No, sir.

Q. The next item he deducts is $32,000 and he did not deduct either of these checks, does he?

A. No, sir.

Q. The next he deducts is $75—the next deduction is: 'Less stockholders' advancements made to carry on the work,' that does not deduct either of those checks, does it?

A. No, sir.

Q. Now, that left $380,075, didn't it?

A. It did.

Q. Then he goes down to the bottom of the page, don't he, and says: 'Deposit in Greene's account as above $575,749.90'?

A. He does.

Q. He says: 'Checks W. T. Gaynor $30,749.90,' doesn't he?

A. Yes, sir.

Q. Then he says: 'Checks to John F. Gaynor as above, $202,408.39'?

A. He does.

Q. By deducting these he produces this balance of $342,591.61?

A. He does.

Q. Does this item of checks $202,408.39 include this $173,050 or the $125,400?

A. No, sir; it does not.

Q. Then instead of being the actual amount left in Greene's account, $342,591.61, it appears that on July 31st, after this transaction took place, that the actual balance in Greene's account was $24,268.66?

A. That is true." (Rec., 7879-82.)

For evidence that Carter was not in New York on July 6, 1897, the date of the alleged Division No. 32, see (Rec., 5809).

For evidence that on July 6, 1897 (when Carter was absent), Westcott canceled Carter's access to Westcott's safe deposit box, in which Westcott kept the securities he gave to Carter in October, 1897, see (Rec., 5809-15).

That Carter did not have possession of the securities when charges were made against him in the fall of 1897, is shown, not only by the fact that Westcott had cancelled Carter's access to the same deposit box in which Westcott had kept those securities (Rec., 5808-20; 6393), but by the following testimony concerning bonds, the coupons from which became due in July to October, 1897, and which Carter did not collect:

CHARLES MCPHERSON testifies:

"Q. (Mr. Stone.) These"—referring to 5 Wabash D. & C. bonds—"are part of the bonds which Carter traded to Westcott on May 10, 1897, in payment for the half interest in the Orange real estate, as shown by Defendants' Exhibit 96-F, are they not?

A. Yes, sir.

Q. These bonds were found in the possession of Robert F. Westcott on October 29, 1897, were they not?

A. They were delivered by him to Captain Carter on that date; yes, sir.

Q. *The coupons due in July,* 1897, *were also found in his possession on October* 29, 1897, *were they not, in the possession of Westcott?*

A. *They were still attached to the bonds when they were delivered to Captain Carter; yes, sir.*

Q. Now, if Carter had had access to these bonds in July, 1897, there is no reason why he should not have deposited the coupons, as far as it appears?

A. There is not; he deposited coupons from bonds in July, 1897.

Q. And in August, 1897?

A. Yes, sir.

Q. When there were no charges or any idea of any charges against him, at that time, as far as it appears?

A. That is true.

Q. Is there anything to show why those coupons for July, 1897, on these 5 Wabash bonds were not collected?

A. There is no evidence in the record to show why they were not.

Q. Some of those other bonds which Westcott had on October 29, 1897, also had uncollected coupons on them?

A. Yes, sir.

Q. The fact that the coupons on these bonds were not collected July 1, 1897, would show that the bonds had ceased to belong to Carter, in view of the fact that he was depositing all the coupons that he had?

A. It would indicate that he did not have possession of the bonds at that time." (Rec., 7415-16.)

* * * * * *

"Q. * * * These coupons which were due in July, 1897, off the New York Central bonds, were on the bonds uncollected at the time Carter received these bonds from Robert E. Westcott October 11, 1897, is that so?

A. That is the conclusion I drew from the fact they were collected as they were; the receipt Captain Carter gave for the bonds does not state what coupons were attached, the October 11th receipt.

Q. Captain Carter did, however, collect a considerable amount of coupons on July 2, 1897, did he not?

A. Yes, sir.

Q. Some of those coupons came from the bonds in court, did they not?

A. They did.

Q. He also collected a considerable amount of coupons on August 3, 1897, did he not?

A. He did.

Q. Some of these bonds are bonds in court, are they not?

A. Yes, sir.

Q. If Captain Carter had had access to these New York Central bonds during July or August, 1897, taking into consideration the fact that he did collect coupons off of bonds due in both of these months, was there any reason he should not have collected the coupons off of these New York Central bonds?

A. I do not know of any reason.

Q. His failure to collect these coupons at the time when he was collecting coupons would indicate that he did not have access to the bonds, wouldn't it?

A. It would; yes, sir." (Rec., 6892.)

"Q. Please look and see if the coupons were on these New York Central bonds on October 11, 1897, when they were delivered to Captain Carter in exchange for that Orange real estate?

A. The receipt of October 11, 1897, does not show what coupons were on the bonds. I am not prepared to answer that question just now.

Q. I understand it to be undisputed the coupons from these New York Central bonds were collected in 1898, I mean the coupons for July 1, 1897, were collected in May, 1898, for the ultimate benefit of Captain Carter?

Mr. Stone: Is that so, Mr. Erwin?

Mr. Erwin: Mr. Johnson can tell you.

Mr. Johnson: The coupons on the New York Central bonds July, 1897, and January, 1898, were collected by Kerr & Co. on account of R. E. Westcott for the benefit of Captain Carter.

Q. (Mr. Stone.) The record shows, does it not, that Captain Carter collected the coupons from various bonds in July, 1897, and August, 1897, does it not?

A. It does.

Q. And it appears from this brief statement that there were coupons due on the New York Central bonds July, 1897, that were not collected till the following year? Mr. Johnson has just so stated?

A. I do not know whether they fell due on July 1, 1897; they fell due early in July, 1897, and were not collected till the following year." (Rec., 6903-04.)

The Witness: "I note that in 1895, the July coupons on these bonds were collected on July 5th, which would show that they fell due at least that early in the month.

Q. When did Captain Carter collect coupons off various bonds in July and August, 1897?

A. On July 2nd he collected coupons, and on July 13th and August 3rd.

Q. If he had had access these New York Central coupons which appear to have been due as early as July 5, 1897, and collected then coupons from other bonds on July 13, 1897, and on August 3, 1897, does any reason appear why he should not have collected these New York Central coupons?

A. No reason appears of record; the inference would be that he did not have the coupons to collect at the time he was collecting the other coupons." (Rec., 6903-04.)

"Q. We find all of those bonds"—referring to 15 Delaware & Hudson bonds—"in the possession of Robert F. Westcott October 29, 1897, do we not?

A. Yes, sir.

Q. We find also that the coupons on these bonds due in September, 1897, were also in the possession of Robert F. Westcott October 29, 1897, don't we?

A. Yes, sir.

Q. Westcott, you have testified, was in the habit of holding up his coupons till they were due before he collected them in many instances?

A. He did so in quite a number of instances.

Q. While Carter diligently collected them at or before the time they were due?

A. He never collected them before they were due, but sometimes deposited them for collection before they were due.

Mr. Erwin: And sometimes he did not collect them till after they were due.

The Witness: Occasionally that is true, yes, sir.

Q. (Mr. Stone.) Where had he the opportunity to collect them when due, didn't he usually collect them when due?

A. It is true that he usually collected them on the first few days of the month, and in quite a number of instances deposited them in bank for collection before they became due.

Q. If Carter had had these coupons for the 15 Delaware & Hudson bonds in August, 1897, before he went to Europe, it would have been consistent with his usual custom to deposit these coupons for collection, would it not?

A. Yes, sir.

Q. He sailed for Europe August 7, 1897, didn't he?

A. Yes, sir.

Q. And did not intend to return till after September 1, 1897?

A. I think that is true; yes, sir.

Q. At the time he sailed for Europe there were no charges against him or any difficulties of any kind, so far as he knew?

A. That is true.

Q. There was no reason, therefore, if he had those coupons in August, 1897, why he should not have deposited them for collection?

A. There is no reason why he should not have deposited them for collection, or arranged for their collection about the time they became due.

Q. We find these coupons on October 29, 1897, in possession of Robert F. Westcott?

A. Yes, sir." (Rec., 7350-51.)

"Q. What about the coupons"—referring to the United New Jersey bonds—"for September, 1897? I call your attention to Captain Carter's receipt to Westcott, dated October 29, 1897, the receipt given by Captain Carter to Robert F. Westcott for these bonds?

A. This receipt shows that the September, 1897, coupons were still attached to the bonds when they were delivered to him.

Q. These coupons were due at what time? I call your attention to the collection on March 2, 1896, which indicates they were due as early as the 2nd day of March.

A. They would be collectible on the first days of the months, early in the month.

Q. As early as September 2, 1897, would they not?

A. Yes, sir.

Q. Captain Carter was in New York in August, 1897, was he not?

A. He was, yes, sir.

Q. And if he had had access to these bonds in August, 1897, he could have left these coupons for collection, could he not?

A. He could have done so.

Q. At that time no charges were made against him, was there?

A. It is my understanding that the record shows that no charges had been made at that time.

Q. He did in fact collect some coupons in August, 1897, did he not?

A. He did.

Q. He in many instances deposited coupons for collection before they were due, did he not?

A. He frequently deposited them some time during the month before they became due.

Q. If, therefore, he had had access to those coupons in August, 1897, he could have deposited them for collection at that time, could he not?

A. He could have done so, yes, sir.

Q. The record shows that when he left, in August, 1897, he did not intend to return before some time in September, 1897. If, therefore, he had had access to these bonds, there is no reason on the record, is there, so far as you know, why he should not have deposited these coupons for collection early in August, 1897?

A. I know of no such reason in the record, and if he had followed his usual practice he would have deposited them before they became due.

Q. Provided he had had access to them?

A. Yes, sir." (Rec., 6995-96.)

"Q. Now, Carter was in the general habit of depositing coupons at or before they became due, was he not, when he had coupons?

A. Yes, sir; he usually deposited them either on the first few days of the month and frequently during the month before they became due, he deposited them for collection when they did become due.

Q. On the other hand, Westcott was in the habit of frequently holding coupons till past due?

A. He was; yes, sir.

Q. Now, Carter was in New York the forepart of August, 1897, was he not?

A. He was; yes, sir.

Q. And at that time he did cash some coupons due early in August, did he not?

A. He did.

Q. And these coupons on these 10 United New Jersey bonds were coming due as early as the 2nd of September, were they not?

A. Yes, sir.

Q. And the evidence shows that he did not intend to get back till some time after that. Now, such being the case, if Carter had access to those 10 United New Jersey bonds in August, 1897, was there any reason shown why he should not have deposited those coupons for collection?

A. As far as it appears, if he had had access to the bonds, and the interest coupons belonged to him, there is no reason shown why he should not have deposited them for collection before leaving for Europe.

Q. There were no charges made against him at that time?

A. There were not.

Q. And he was in fact depositing coupons immediately before he started for Europe, was he not?

A. Yes, sir.

Mr. Erwin: Why do you say that he did not collect the coupons on these bonds after October 29th, when there is no question about the fact he did have them? He did not collect them till way into 1898; there is no reason for that either?

The Witness: I do not understand that the bonds themselves were in his possession after October 29th. It shows they were delivered and receipted for; I do not understand that he had physical possession of them.

Q. (Mr. Stone.) The evidence shows that October 29, 1897, they were in the hands of his attorneys, Kellogg & Rose, or Mr. Rose?

A. Yes, sir.

Q. And that they continued in the hands of Kellogg & Rose, or Mr. Rose, till some time in 1898, when they were turned over to Robert E. Westcott, son of Robert F. Westcott?

A. Yes, sir.

Q. And that soon after they were turned over to Robert E. Westcott, the coupons were collected?

A. Yes, sir.

Mr. Erwin: You do not find any reason in the fact that during September, 1897, and October, or during that period that Captain Carter was under investigation in regard to these transactions, before the Board of Engineers?

The Witness: That circumstance considered alone might amount to a reason for that.

Q. (Mr. Stone.) But the fact that the charges were made against him early in September, 1897, would have no bearing, would it, upon the fact that he deposited coupons in August, 1897, before any charges were made against him, or any charges even imagined?

A. It would not.

Q. And if he had access to these bonds in August, 1897, when he did in fact collect coupons through his bank account, there was no reason then existing, was there, why he should not then deposit these coupons for collection, so as to have them collected when they came due the 2nd day of September?

A. There was none.

Q. And the reason Mr. Erwin referred to as being the reason why they were not collected after October, 1897, would cut no figure in regard to the situation in August, or the first two days in September, would it?

A. It would not.

Q. The evidence also shows, does it not, that Mr. Rose some time in October, 1897, during the trial of Captain Carter, sold some of the bonds that are in controversy herein and obtained the proceeds thereof?

A. Yes, sir.

Q. Mr. Erwin, I think, stated that he sold some of these bonds on October 12, 1897. If that is correct, it would show that there was no attempt on the part of anybody to conceal these bonds in any way, or to conceal these bonds from the public, was there?

* * * * *

A. The fact that some of them were sold by Captain Carter's attorney soon after they were delivered to Captain Carter by Mr. Westcott would indicate that there was no attempt made to conceal the fact that the bonds had been delivered by Mr. Westcott.

Q. It was easy to trace the coupons, as it was to trace the bonds, wasn't it?

A. Yes, sir.

Q. And the sale and disposition of the bonds in a public way was precisely the same thing as the collection of the coupons, was it not?

A. Yes, sir.

Q. Hence, if there was any reason for prohibiting the sale of these bonds on October 12, 1897, there was no good reason why the coupons should not be collected, was there?

A. There was no reason which would apply to the coupons and not to the bonds themselves." (Rec., 7107-14.)

The Witness: "Complainant's Exhibit 272, which was the receipt given by Captain Carter for those and other bonds on October 29, 1897, shows that at the time those bonds"—referring to Long Dock bonds—"were delivered to Captain Carter, the October, 1897, coupons were still attached to the bonds.

Q. If Captain Carter had had access to these bonds prior to October 29, 1897, he would have had an opportunity to cut off these coupons and cash them would he not?

A. He would have.

Mr. Erwin: What are the dates of the coupons first due?

Mr. Stone: The coupons due October 1, 1897.

The Witness: They fell due October 1, 1897.

Mr. Erwin: These are the ones he would have had an opportunity to cash?

The Witness: Yes, sir. Captain Carter, however, had a practice of depositing coupons in the bank before they fell due, in a good many instances." (Rec., 6793.)

The Witness: "I think it is true that Mr. Westcott collected coupons that fell due usually later than the 10th of the month, even if they fell due on the first of the month, at least he did so frequently.

Q. That is to say, it frequently happened so far as Mr. Westcott was concerned that he did not collect coupons till ten days or so, or even longer, after they were due?

A. That is true.

Q. Now, taking into consideration, and the fact that these bonds delivered to Carter on October 29, 1897, contained coupons that were past due, would that strengthen your evidence heretofore that these bonds belonged to Westcott?

A. I would consider that as a circumstance in considering whether or not they after that belonged to Captain Carter. He was in the habit of depositing them before they fell due, whereas Mr. Westcott would allow them to lay till some time after they fell due before depositing them for collection.

Q. The fact, therefore, that some of the bonds delivered Carter on October 29, 1897, had coupons on them that were thirty or sixty days past due would substantiate that idea, would it not?

A. It would." (Rec., 6825.)

Johnson's Alleged Adjustments.

In complainant's brief there are many alleged "adjustments" between Westcott and Carter, with the object of making it appear that it was Carter and not Westcott who owned the securities in court.

Most of those alleged "adjustments" were never offered in evidence, but have been manufactured outside of the record.

That those alleged "adjustments" are untrue is shown by the testimony of Nelson and McPherson, who swear that the true statements of the relations between Westcott and Carter are to be found in Defendant's Exhibit 96-A, etc., and that any statements which do not agree with those exhibits are false. (Rec., 7773, 7888.)

But there is one exhibit in the record which utterly annihilates every statement of complainant as to the alleged "adjustments" between Westcott and Carter, *i. e.*, Defendant's Exhibit 98 (Rec., 9603), which shows that month after month, and time after time, when Westcott collected coupons, he sent to Carter the money coming from the coupons off Mrs. Carter's bonds, and kept and used as his own the money coming from the coupons off the bonds the complainant now contends belonged to Carter at that time. (Rec., 7415, 7693.)

This Defendant's Exhibit 98 represents adjustments made by Westcott himself, and made at the time, and it utterly overthrows the claims of complainant, and it utterly destroys the testimony of Westcott which he gave some 6 or 7 years after those transactions took place. For further details, see (Rec., 7701, 7819, etc.).

But aside from all this, the utter worthlessness of John-

son's "adjustments" will be seen at a glance from the following:

When Johnson proceeds to make an "adjustment," he picks out items on opposite sides which are equal to each other, and omits everything else, and then of course his account "balances."

For example, Johnson takes a real item of $9.60 of November 24, 1896, which he puts on one side, and he invents a fictitious item of $9.60 which he puts on the other side, and then his "adjustment" balances.

The real account is shown on page 9586, etc., of the record, which shows that Johnson has omitted many items.

For instance, the heading of one "adjustment" reads from "May 12 to Nov. 15, 1896," and on its face the adjustment exactly balances.

On examining the same, it is seen to embrace items of November 24, 1896. The reason why it is headed "to Nov. 15, 1896," and yet embraces items on November 24, 1896, is that on November 23, 1896, Westcott received from Carter $3,781.25 (Def. Ex. 96-F). This was fatal to the alleged "adjustment" of Johnson, so he carefully suppressed that item of $3,781.25.

A similar method of forcing balances, by omitting real items, and by inserting fictitious items, is made use of by the witness Johnson; in fact, that method of false accounting is employed in nearly all of the alleged "adjustments."

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THE $75 MATTER.

It has already been seen in Request No. 32, that Johnson's Exhibit 319 shows Greene sometimes received $75 more than what Johnson calls a "third" of Greene and Gaynor's profits; that Gaynor sometimes received that $75; and that in the other cases in which it was paid out, the record does not show to whom it was paid.

In one instance (Jan. 8, 1894), it may have been paid to W. T. Gaynor (Rec., 6881).

That the alleged payment of $75 per trip by Greene and Gaynor to Carter, to induce him to come after $500,000 of bribe money, is not only preposterous, but that it is utterly without foundation, is shown in the following testimony:

OBERLIN M. CARTER testifies:

"Q. There is a suggestion on one of Mr. Johnson's Exhibits, that perhaps you got $75 a trip for going up to New York to receive vast amounts of money which Greene & Gaynor were going to give you for helping them defraud the Government. Did you ever receive any such amounts of money from Greene & Gaynor, or from anybody else, I mean $75, at any time, under any circumstances?

A. No, sir. That whole matter is pure fiction." (Rec., 5723.)

CHARLES MCPHERSON testifies:

"Q. Mr. Johnson has invented an item of $75 to help to balance his accounts, which he calls cost of Carter's trip to New York. You have been over the gross receipts and disbursements during that period?

A. Yes, sir.

Q. Does it appear anywhere that he received any such amount of $75?

A. It does not.

Q. It appears in some instances that the $75 which Mr. Johnson claims exists was kept by Greene or kept by Gaynor, or some of those, does it not? You have called attention to it in your testimony, have you not?

A. Yes, sir; it appears it was paid to them.

Q. Does it appear that Westcott, if Westcott had any deal with Greene & Gaynor, that he ever got that $75?

A. It does not.

Q. It appears then by complainant's own claim, does it not, that he did not get the $75, that whatever his deposits there were that did correspond with some check of Greene & Gaynor's, they did not include the $75, did they, as deposited by him?

A. That is true." (Rec., 7769-70.)

"Q. Isn't it a fact prior to July, 1894, that Mr. Johnson proceedd upon the very definite theory that not only was Carter present at the time these alleged divisions were made, but that he was paid for being there, or somebody was, $75?

A. Yes, and some of his divisions made after July, 1894, show that arbitrary item of $75.

Q. The $75 trick Mr. Johnson follows up right along there, but the theory that that $75 was paid to Carter in order that he might be there when the divisions took place seems to have fallen to the ground, does it not, when you

come to July, 1894, because there is no evidence of any division in which it appears that either Carter or Westcott received any money or deposited any except small sums coming from other sources?

A. That is true.

Q. Now, on this Division 19 Mr. Johnson claims that there were $75 paid to somebody for Carter's trip to New York, does he not?

A. In Complainant's Exhibit 319, complainant's accountants under Division 19 inserts an item of $75, which he describes as follows: "Less arbitrary allowance, trip Carter to New York."

Q. The whole Exhibit 319, taken as a whole, purports to show, does it not, that this $75 was paid as Carter's expenses to New York, so that he might be there when the money was divided?

A. Yes, sir.

Q. And yet we find in Division 19 that the $75 is deducted out and there is not any evidence of any deposit of any money either by Carter or Westcott which corresponds in the slightest degree with the alleged division, is there?

A. There is not." (Rec., 7005-06.)

"Q. I next call your attention to Complainant's Exhibit 319, Division No. 20, wherein Mr. Johnson states that Greene & Gaynor received Government checks amounting to $30,075 which they cashed November 12, 1894; that B. D. Greene received $20,075 thereof, John F. Gaynor $10,000 thereof, and Greene gave a check which was paid on that date, dated November 12, 1894, amounting to $10,000. That would leave about one-third of that amount in Greene's hands, about one-third in Gaynor's and about one-third in the hands of some third person, would it not?

A. Yes, sir, it *would leave the odd* $75 *in Greene's possession.*

Q. The leaving of the $75 in Greene's possession would be evidence that it belonged to Greene, would it not, in the absence of any showing otherwise?

A. It would, yes, sir.

Q. Is there any showing it was paid out?

A. There is not.

Q. It, therefore, presumtively belonged to Greene, did it not?

A. Yes, sir." (Rec., 7029-30.)

"Q. Now, on one of these divisions heretofore made

by Mr. Johnson, you find, do you not, *that the* $75.00 *that he theorizes about remained with W. T. Gaynor as the result of the transactions shown by Mr. Johnson?*

A. *Yes, sir.*

Q. In the present case it goes to somebody else, does it not?

A. It appears to be on the check which is designated here in favor of unknown.

Q. That is one you say that went presumptively to John F. Gaynor?

A. Yes, sir.

Q. So this $75, whatever it was, was sometimes kept by Will Gaynor and sometimes received by John Gaynor?

A. Yes, sir; and sometimes given to an unknown party; there is no evidence to show who that unknown party was, but the presumption is that if John F. Gaynor was interested in the profits, it went to him.

Q. In the case I have just spoken of, where $75 was retained by Will Gaynor and there was no indication, was there, that Will Gaynor paid out any of that money?

A. There is not.

Q. But the check unaccounted for in that particular case went apparently to somebody else, did it not?

A. Yes, sir.

Q. So that the $75 went to Will Gaynor, and the unaccounted payment went to somebody else?

A. Yes, sir.

Q. That would indicate, would it not, that the $75 sometimes went in one direction, and the division, so-called by Mr. Johnson, went in another direction?

A. Yes, sir." (Rec., 7114-15.)

It is true that under an arrangement with the Chief of Engineers Carter went to New York at various times to visit his father-in-law, Westcott (Rec., 906) (Rec., 6169); and it is also true that it now appears Greene and Gaynor deposited some of their checks for contract work done at some of the times Carter was in New York; but Carter had no possible means of knowing that they did this, for the checks of a disbursing officer never come back to him as do the checks of private individuals, and hence he could not know when or how they were cashed. See the testimony of Jordan, Assistant Treasurer of the United States (Rec., 2365).

The record admittedly shows that Carter made all of his

disbursements (when he was in funds) on or very soon after the 1st of each month; and it also shows that the summaries of the work of the previous month were not required to be ready for sending to Washington until the 10th (Rec., Def. Ex. 131); so that Carter had a better opportunity to be absent from Savannah while his clerks were making up those reports than at any other time, and the record also shows that most of Carter's visits to New York were made at that time of the month (Rec., 9066 *et seq.*).

The prosecution claims it was suspicious that Carter was in the City of New York at some of the times the contractors (who lived there) deposited their money; but they fail to say that the record shows most of Carter's visits were to his father-in-law; and they fail to say further that on many of those alleged occasions of deposits of money by the contractors, Carter was not in New York at all. The record shows that on the 32 occasions picked out by the prosecution, Carter was not in New York on 8, and was present on 24 (Rec., 9066 *et seq.*); but Carter could not be expected to remain away from New York, where his father-in-law lived, simply because it might be possible the contractors, who also lived there, should do some business while he was there.

But these suspicions are disposed of by the finding of the Court that there is no evidence that Carter ever knew anything of the transactions of the contractors, or of the possible association of Westcott with them.

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CARTER'S INCOME AND EXPENSES.

It has already been shown, in Reference 24 herein, that Carter has submitted Exhibits 96-A, 96-B, 96-C, 96-D and 96-F, which give the amount and the source of all the moneys he ever had, over and above his authorized salary and allowances.

For a statement of the moneys given by Westcott to Carter, in which the checks or deposit tickets are in Westcott's own handwriting, see (Rec., 5768-69).

For evidence as to the amount of money Carter had, and the amount he expended (as well as the source of those moneys), reference is made to the following testimony:

CHARLES MCPHERSON testifies:

"Q. I want to call your attention to what money Carter had between 1892 and October, 1897, when Westcott

gave him the bonds which are in controversy. He appears to have had $2,500, does he not, which Westcott deposited to his credit June 8, 1892, that Carter says was to give a special entertainment to navy officers at West Point?

A. Yes, sir.

Q. And July 21, 1892, he received from his wife through Westcott money with which to buy bonds amounting to about $10,000, did he not?

A. Yes, sir.

Q. That was money which came from his wife's estate?

A. Yes, sir.

Q. Now, on December 13, 1892, he received $2,500 from Westcott, did he not?

A. Yes, sir.

Q. A little later he received $750 to pay for his wife's casket?

A. That is true.

Q. On December 29, 1892, it appears from his testimony, and from the defendants' Exhibit 96-A there was $50,000 in Mrs. Carter's vault, consisting of $36,600 in currency, 10 bonds of the face value of $10,000, and 35 shares of Tow boat stock costing $3,400?

A. Yes, sir.

Q. And it appears between that time and May 2, 1893, that Westcott reinvested and handled more or less of that property, and eventually gave Carter a check on that date to balance the account due by him to Carter for Mrs. Carter's estate?

A. That is true.

Q. Now, on August 11, 1893, Westcott received a check from Reed & Flagg for $565 which he gave to Carter as a present, according to Carter's testimony, did he not?

A. Yes, sir.

Q. On September 18, 1893, a check was received from Reed & Flagg, charged to Westcott for $1,050, which Westcott gave to Carter, according to Carter's testimony, as a present?

A. Yes, sir.

Q. On November 15, 1893, Westcott gave Carter $250?

A. Yes, sir.

Q. On December 21, 1893, Westcott gave Carter a

check for $1,250 with which to pay for a portrait of Carter's wife, did he not?

A. Yes, sir.

Q. During the year 1894, Westcott gave Carter a yearly allowance, or fixed allowance of $10,000 per year?

A. He did.

Q. Just before he went to Europe in January, 1895, and around about Christmas, 1894, he deeded him the lot on Eighth avenue, did he not?

A. Yes, sir.

Q. During the year 1895 Carter had from Westcott as his yearly allowance the exact sum of $12,000, didn't he?

A. Yes, sir.

Q. And on July 1, 1895, he had a balance of $500 remaining from the purchase of some property down at Savannah, the Hunting Island property?

A. Yes, sir.

Q. And during the year 1896 Carter received from Westcott as a net allowance some $18,000 for that year?

A. That is right.

Q. And early in 1897, May 10, 1897, Westcott delivered to Carter a deed for a half interest in some real estate which Westcott owned in Orange, New Jersey, and made a bargain by which buildings were to be erected on that real estate, and received from Carter $63,000 face value of bonds and so forth, mostly coming from Carter's wife's estate, in payment for the half interest in the land in the payment for a half of the cost of the buildings that were to be erected, according to Carter's testimony, did he not?

A. Yes, sir.

Q. During the year 1897, up to October, Carter received from Westcott an amount almost exactly the *pro rata* amount of the amounts which he had received for 1896, did he not?

A. Just about, yes, sir.

Q. Now, the next money which Carter received was on October 11, 1897, when he received back from Westcott the $63,000 in bonds and delivered back to him the deed to the Orange real estate, and so forth, according to his testimony, did he not?

A. Yes, sir.

Q. And the next and last money which he ever re-

ceived from Westcott was on October 29, 1897, when he received the bonds in controversy, according to his testimony, as being the amount which Carter's wife would have received from Westcott had she lived, and which Carter says Westcott agreed to give to him, when Carter's wife died in 1892, if Carter would not remarry, and devote himself to Westcott, which he did?

A. Yes, sir.

Q. *Did Carter have or spend during all those years any other money except what came from his army income, and the small amount which he may have earned by permission of the Chief of Engineers, or his superior officers, by way of doing a little outside work for towns and villages, and so forth, in the engineering line?*

A. *And the income from his wife's estate.*

Q. *Besides the income from his wife's estate?*

A. *That appears to be all of the funds which he had.*

Q. Now, all these things are shown, are they not, in detail upon Defendants' Exhibit 96-A, B, C, D, and F?

A. Yes, sir.

Q. If, then, the complainant claims there was any deal between Greene and Gaynor and Westcott, of any kind outside of this loan, which Westcott made to Greene in connection with the 1896 contracts, is there any documentary evidence that shows that Carter knew about it?

A. There is not?

Q. *Is there any direct testimony in the present case stating that Carter knew about it?*

A. *I have not seen any, and I have examined all that is referred to in complainant's exhibits.*

Q. If he did know anything about it, then the record shows no documentary evidence and no direct evidence, it must necessarily appear by circumstantial evidence?

A. Yes, sir." (Rec., 7765-69.)

"Q. The statement here in this bill of complaint that Carter's investments were made secretly in stocks, bonds, loans and real estate, is there any evidence whatever showing that Carter made any secret investments anywhere?

A. There is not.

Q. All the investments that he appears to have made, and all the investments Robert F. Westcott made, were made openly and above board, were they not?

A. Yes, sir.

Q. Even all these securities that are in controversy

in the case, those that they claim belonged to Carter, those that came from his wife's estate, those that they claim were held by Westcott for Carter's benefit, were all bought openly and above board, were they not?

A. They were purchased in the usual method of buying stocks and bonds.

Q. There is absolutely no secrecy about that, in any way, in the ordinary sense of the word?

A. There was not.

Q. They were bought just as a man who is carrying on an honest transaction always buys them, were they not?

A. As he usually buys them; yes, sir.

Q. There is a statement here in this bill of complaint that various and sundry moneys have been traced by Mr. Johnson from Greene and Gaynor to Carter. Does he indicate any evidence, or refer to any evidence, either in any of his exhibits or in his testimony which shows anything of that kind?

A. Only as circumstantial evidence, which he claims shows that he has traced them.

Q. *You mean that he goes on and states what Greene and Gaynor paid out, and what Westcott deposited, and what Carter deposited and then assumes from that, that this money that Westcott and Carter deposited came from Greene and Gaynor, is that what he means?*

A. *Yes, sir.*

Q. *Is there anything else?*

A. *There is not.*

Q. There is in this bill of complaint here a comparison of Carter's income and expenditures. Take the year 1892, it says that his expenditures weer $8,354.24. Have you looked into that matter any?

A. Not with any considerable care.

Q. It says his gross income from salary and securities was $3,269.50 during the year 1892. That is practically all salary, isn't it?

A. Pretty nearly all salary, yes, sir.

Q. Now, this states here that his gross expenditures in 1893 were $14,982.74. He has filed a statement here, has he not, of what his receipts and expenditures were for 1893?

A. Yes, sir.

Q. And it does not agree at all with Mr. Johnson's statement, does it?

A. Captain Carter's statement does not agree with Mr. Johnson's statement; no, sir.

Q. Is Captain Carter's statement correct according to the facts, as they appear? I refer now particularly to Defendants' Exhibit 96-C; that exhibit shows where Carter got all the money that he had during that period except his army income, doesn't it?

A. It does not attempt to show what he might have earned from outside engineering work.

Q. It does show that during that period Westcott made certain gifts to him?

A. Yes, sir.

Q. And shows that he had certain income from his wife's estate?

A. Yes, sir.

Q. It does not show what money he made off of incidental engineering work for cities and villages, and so forth, does it?

A. It does not. Defendants' Exhibit 96-C does not purport to show in what manner Captain Carter expended his income, it does show the nature of his income.

Q. *Mr. Johnson has stated in this bill of complaint what he considers was Carter's income from salary and securities, has he not?*

A. *Yes, sir.*

Q. *Now, that disagrees as to the years* 1893, 1894, 1895 *and* 1896 *with Defendants' Exhibit* 96, *does it not?*

A. *As to income; yes, sir.*

Q. *And in so far as it disagrees, is it correct or is it wrong?*

A. *It is wrong.*

Q. I refer you here especially to an allegation in this bill of complaint, sworn to by Mr. Johnson, as follows: 'The said Oberlin M. Carter, however, induced his brother-in-law, Robert E. Westcott, to voluntarily appear before said Court Martial and to testify in his behalf as to said Robert F. Westcott having given "money" to said Oberlin M. Carter, to create the impression that the income so spent by said Oberlin M. Carter had been gifts from his father-in-law, although the said Robert F. Westcott had told the said Robert E. Westcott that this was not true.'

If Robert F. Westcot did tell Robert E. Westcott he did not make these gifts, did he tell the truth?

A. He did not tell the truth.

Q. If these allegations in this bill of complaint seek to insinuate that Carter and Robert E. Westcott testified falsely, is it correct with regard to the idea that Robert F. Westcott had given Carter money?

A. The record shows that Robert F. Westcott had given Captain Carter money, yes, sir.

Q. Large amounts of money at various times, doesn't it?

A. Yes, sir.

Q. And if Robert E. Westcott testified that Robert F. Westcott had given Carter money, he testified the truth, didn't he?

A. He did.

Q. Here is an allegation with regard to I. Stanton Carter intimating that he was induced to commit perjury in testifying that Robert F. Westcott had given Carter money. It is a fact, is it not, that Robert F. Westcott did give Carter large amounts of money during that period?

A. Yes, sir.

Q. That fact is proved by the checks and deposit slips and various other matters in his own handwriting, is it not?

A. Yes, sir.

Q. 'It is stated here that 'Before this Court Martial the said Carter and the said Benjamin D. Greene were volunteer witnesses in behalf of said Carter and again stated that neither said Robert F. Westcott nor the said Carter had been interested beneficially in said contracts, and that the said securities handled by said Carter were the securities belonging to the private fortune of the said Robert F. Westcott, in which said Carter had no personal interest, but the income from which had been given him by said Westcott. Your orator further avers on information that the said Oberlin M. Carter endeavored to induce the said Robert F. Westcott to appear before said Court Martial and testify falsely to the same effect, but the latter while he did not desire to testify against the husband of his dead child, would not consent to go upon the stand otherwise than to tell the truth of the transaction, and to disclaim any interest in these securi-

ties and investments. To avoid testifying against his said son-in-law, said Robert F. Westcott departed to Europe and remained away during the Court Martial proceedings.'

You have already testified, have you not, that if Westcott testified down in New York that he did not know anything about those securities, that he testified falsely, haven't you?

A. Yes, sir.

Q. You have already been over the history of these bonds, and so forth, and you have found, have you not, that Robert F. Westcott either bought with his own private check or deposited to his own credit and his own use on deposit slips in his own handwriting, $230,000 of these identical bonds during the years 1893, 1894 and 1895, have you not?

A. Yes, sir.

Q. It is not true, is it, that Carter had the income of these bonds which are in controversy in this suit?

A. It is not.

Q. He had no coupons whatever from any of the bonds in controversy in this suit during the year 1893, except those that came from his wife's estate, did he?

A. It may be true that he had the proceeds of some of the coupons; if he did, they were treated as part of his allowance, or gifts from Mr. Westcott for that year.

Q. As a matter of fact, he did not have any of those coupons at all in 1893, except a few he collected and turned the money over to Westcott?

A. That is true as to 1893.

Q. *That is to say, he did not have any coupons from these bonds in controversy, except those from his wife's estate during the year* 1893, *either as an allowance or otherwise, except that he collected a few of them for Westcott and accounted to Westcott for the money?*

A. *That is true.*

Q. In 1894 he had a small part of his allowance from coupons off from some of these bonds in controversy, didn't he, which Westcott gave him as an allowance for that year?

A. Yes, sir.

Q. In 1895 all of the coupons off of all the bonds in court were deposited to Westcott's credit in Westcott's bank account, were they not?

A. They were; yes, sir.

Q. In 1896, Carter had an allowance of $18,000 a year, didn't he?

A. Yes, sir.

Q. And part of that allowance was paid by coupons off from some of these bonds?

A. That is true.

Q. And in 1897 he was to have an allowance of the same amount, according to the settlement between him and Westcott in December, 1896, was he not?

A. Yes, sir.

Q. And he did have up to October, 1897, an amount about a *pro rata* amount of that $18,000, didn't he?

A. Yes, sir.

Q. A part of that was paid by coupons off these bonds in controversy?

A. That is true.

Q. *Outside of receiving from Westcott as part of his allowance for those years, and outside of the coupons that he received from bonds coming from his wife's estate, did Carter ever have at any time prior to the time that Westcott gave him these bonds in October, 1897, any income off of any of the bonds now in controversy?*

A. *He did not.*

Q. *Did he have any income off the Delaware & Hudson, or the Delaware & Lackawanna stock in controversy, except as charged up against his allowance?*

A. *He did not.*" (Rec., 7777.)

Defendant's Exhibits 96-A, 96-B, 96-C, 96-D and 96-F are statements of account between Westcott and Carter, from 1891 to 1897, inclusive.

They show that what moneys Carter had were received from his father-in-law, and that not one penny was ever received from Greene and Gaynor.

That none of the moneys Carter had ever came from Greene and Gaynor is shown by the following testimony:

CHARLES MCPHERSON testifies:

"Q. I call your attention to Defendant's Exhibits 96-A, 96-B, 96-C, 96-D, 96-E, 96-F and 96-G, and I will ask you if you have seen those exhiibts before?

A. Yes, sir, I have.

Q. Who prepared those exhibits, if you know?

A. With the exception of 96-E, the exhibits themselves were prepared by me. Exhibit 96-E was prepared by

Captain Carter and myself working together, but I think he actually compiled it.

Q. In preparing Exhibits 96-A to 96-G, inclusive, excepting 96-E, did you consult more or less with Captain Carter and me?

A. I did. I consulted very much with both of you.

Q. At the time when you commenced preparing these exhibits did you have before you the diaries of Captain Carter which have been introduced in evidence?

A. I had before me the typewritten copy, I never used the originals except when I examined them in a few instances, but I worked from the typewritten copy of the diaries." (Rec., 6612-13.)

"Q. Have you examined those diaries and those statements upon which Exhibits 96-A, B, C, D, F and G are based sufficiently to determine whether or not the diaries and those memoranda were made at the time they purport to be made or manufactured years afterwards?

* * * * *

A. I would not attempt to say from the external appearance of any of the memoranda which I have seen, when they were made. They have to me all the appearance of having been made long ago, but I am not an expert on those questions. On the basis of those memoranda, however, we find that R. F. Westcott occasionally drew checks payable to O. M. Carter, or else payable to himself, and were by him endorsed and deposited in bank to Carter's credit, for odd amounts, and it shows that items of that nature were at that time before R. F. Westcott in making his account. Now, as an accountant, I would say that those items are genuine, from the reason that they are the basis of a check drawn and deposited in settlement of the account; but I do not attempt to testify as an expert, from the external appearance of the instrument.

Mr. Erwin: May not the check have been the basis of the memoranda, as well as the memoranda being the basis of the checks?

The Witness: *No, that is not possible, because we have the memoranda and we had the check before we were able to discover exactly the basis of the check, and it was only by discovering one memorandum after another and placing them together that we discovered exactly upon what basis the accounting was made.*" (Rec., 6616-18.)

"Q. (Mr. Stone.) In connection with the matters that are undisputed in this case, and in connection with complainant's exhibits, and so forth, have you tested the accuracy of Captain Carter's diaries, these memoranda which are referred to in Captain Carter's diaries and the defendant's exhibits, as having been made by Captain Carter?

A. I have.

Q. Have you tested the accuracy of them in every instances where there is any reference to any letter, or exhibit, and complainant's exhibits?

A. I have.

Q. Have you found them to be absolutely in conformity with them?

A. I have so found them.

Q. Have you the slightest reasons to suspect they are other than Captain Carter's statement of what they purport to be?

A. I have not; on the other hand, I have every reason to believe that they are a correct statements." (Rec., 6739-40.)

"Q. If the items then are beyond dispute, the only question you have to solve is the correct amount, is it not?

A. That is true.

Q. In the arrangement of the items, if you got a suggestion from a stranger, that does not affect in the slightest degree the items themselves, does it, it merely affects their classification, whether you put them on the debit or the credit side?

A. It does not affect the items." (Rec., 6727-28.)

"Q. * * * You base your final conclusion *not* upon Carter's diaries, nor upon any pencil memorandum, or anything of that kind, but upon tests which you have made, do you not, of the correctness of those items?

A. That is true.

Q. And if those memoranda were incorrect, why, then of course you would know it in the final difference, would you not?

A. I would." (Rec., 6728.) (See, also, Rec., 6945.)

ROBERT NELSON testifies:

"Q. (Mr. Stone.) It appears, does it not, from Defendant's Exhibits 96-A and 96-C and 96-D and 96-F that during the year 1893 and the year 1894 and in January,

1895, before Westcott went to Europe, that he and Carter appeared to have had six different settlements by each of which Westcott gave him a check for an odd amount to balance, and it appears by this statement to which we have referred does it not that those checks in every instance exactly balanced the account between Westcott and Carter?

A. That is so.

Q. Where you find six instances in the course of a little over two years where the parties have balanced their own accounts and where the figures come out exact with the checks which they gave between themselves that would be a very strong account would it not?

A. Yes, sir, it would

Q. *If on the other hand you find an account made out upon Mr. Johnson's theories which does not agree at any time with any of these settlements, would you consider his account of any reliability whatever?*

A. *None at all.*" (Rec., 7887-88.)

"Q. And in your statement you have accepted these defendant's exhibits, setting out in the form of an account, Nos. 96-A to F and so forth in there, you have taken entries on that as being true?

A. No, I would hardly say that I have taken the entries on that as being true, I have compared the entries with the complainant's exhibits and most of the entries there are taken from the complainant's exhibits, and other entries; these defendant's exhibits *are based on periodical balances, and taking the Government's exhibits and finding most of the items in there, and of course the other items gotten from other sources, purely the defendant's sources, but taking the accounts both debit and credit put together in the account, with the balance usually by a check from Westcott to Carter, and taking into consideration the fact that most of the items are in complainant's own exhibits, I have no hesitation in saying that these are true statements.*" (Rec. 7906.)

For the testimony of Charles McPherson concerning the periodical balance which prove the correctness of the Exhibits 96-A, 96-B, etc., see (Rec., 7687-7710).

CHARLES MCPHERSON testifies concerning the source of the moneys Carter had as follows:

"Q. * * * Is there any evidence in the record whatever further than Exhibit 319 * * * or in the

evidence upon which Mr. Johnson says Exhibit 319 is based to show that Captain Carter ever received a penny of money from Greene and Gaynor directly or indirectly?

A. There is not.

Q. Is there the slightest thing in the evidence to indicate that Carter ever had anything to do with a division of their profits by Greene and Gaynor?

A. There is not.

Q. Is there a scrap of paper or a piece of documentary evidence or anything written or printed that has ever been referred to in this case so far as it appears that indicates in the slightest degree that Captain Carter ever had any connection whatever with Greene and Gaynor, or with any contractor under his charge with regard to any of the transactions in controversy or mentioned in this case?

A. There is no original evidence of that sort; there are, of course, the Complainant's Exhibits 590 and 319.

Q. Is there any one that Carter's name is signed to, or any one in Carter's handwriting that in any way, shape or manner connects Carter with these contractors, or anything involved in this case, except a few letters which he wrote to Greene away back in the '80's, and a transaction by which he sent Greene a thousand dollars to give to some woman, and perhaps one or two small items of that same general character?

A. There is not." (Rec., 7746-47.)

The Witness: "I have not found any evidence in this case of the nature described in the question, showing any relation between the contractors and Carter as to these funds which are shown upon complainant's exhibits, which it is claimed were paid by the contractors for Carter's benefit.

Q. So far as you have seen, is there the testimony of any witness who says or attempts to show that he knows anything of his own knowledge, that Carter had anything to do with the money transactions covered by the complainant's exhibits herein, or that he ever had anything to do with Greene and Gaynor in connection with these matters except to pay them their checks as a Government officer?

A. There is no such evidence in the record which I have examined; I have gone through the evidence of the court martial record and the Board of Engineers' record and so far as the evidence is referred to on Complain-

ant's Exhibit 319; I have not been able to find any such evidence." (Rec., 7749.)

The Witness: *"There is not a particle of evidence * * * of any dealings between Captain Carter and Greene and Gaynor as to these funds which the complainant says he received from Greene and Gaynor.*

Q. If there is any evidence on the subject, it is not direct evidence, is it?

A. It is not direct evidence.

Q. Either one, documentary, evidence or testimony?

A. That is true.

Q. And if there is anything in the case on the subject, it would necessarily be circumstantial or inferential?

A. Yes, sir.

Q. Is there any evidence that Greene and Gaynor ever gave Carter any checks for any money?

A. There is not.

Q. Is there any evidence that any check issued by Greene and Gaynor was payable to Carter's order?

A. There is not.

Q. Is there any evidence that any check ever issued by Greene and Gaynor was ever cashed by Carter?

A. There is not.

Q. Is there any evidence that any check ever given by Greene and Gaynor was ever delivered to Carter?

A. There is not.

Q. Is there any evidence that any check given by Greene and Gaynor was ever deposited in Carter's bank account anywhere or in his broker's account, or anywhere else for his benefit?

A. There is not.

Q. Is there any evidence that Robert F. Westcott ever received a check from Greene and Gaynor, except the check for $21,000 repaying the loan which he made Greene?

A. There is not.

Q. Is there any evidence that a check ever came from Greene and Gaynor payable to Westcott's order except that one check?

A. There is not.

Q. Is there any evidence that Robert F. Westcott ever cashed any check of Greene and Gaynor's, except the $21,000 check?

A. There is not.

Q. Is there any evidence that anybody ever received any such check on his behalf, except the $21,000?

A. There is not.

Q. Is there any evidence that any check of Greene and Gaynor's was ever deposited to Westcott's credit anywhere?

A. There is not.

Q. Is there any evidence that Robert F. Westcott was ever the payee of any other check drawn by Greene and Gaynor, except the $21,000 check?

A. There is not.

Q. Has there been produced in this case by the complainant or produced at all, by Greene and Gaynor or anybody any evidence of any other check?

A. There is no evidence in this case, and I do not know of any having been produced at any time.

Q. Does the complainant attempt to prove to whom these checks were payable, that they call checks payable to the order of 'unknown'?

A. They do not.

Q. Is there any evidence showing that Westcott ever had any checks of Greene and Gaynor in his possession, except the $21,000 check?

A. There is not.

Q. Is there any evidence that Westcott ever collected any check of Greene and Gaynor's, except the $21,000 check?

A. There is not.

Q. Is there any evidence who in fact did collect those checks which are listed here to the order of 'unknown'?

A. There is not.

Q. For all that appears, they may have been collected by anybody, Greene or Gaynor, or any of their own people, or somebody that they owed?

A. Yes, sir, there is absolutely no evidence as to who did collect them.

Q. Is there any evidence here pointing out what person or persons ever paid any money to Westcott or Carter, outside of the $21,000 which Greene paid back to Westcott?

A. Your question of course is limited to the funds in controversy?

Q. Always the funds in controversy.

A. There is not.

Q. I mean money which the complainant claims came from Greene and Gaynor?

A. There is not.

Q. Is there any evidence or item that appears to show that the money which Westcott or Carter deposited was the same money which Greene and Gaynor paid out, except those few instances where the deposits by Westcott appear to be about the same date and same amount as some of the checks by Greene and Gaynor?

A. There is only the circumstantial evidence of the coincidence.

Q. There were very numerous instances of deposits by Westcott, were they not?

A. He was a man who made a great many deposits in his bank account, yes, sir.

Q. His bank account would show hundreds of thousands of deposits, wouldn't it?

A. Yes, sir." (Rec., 7750-53.)

"Q. *Do you find any evidence of any kind, shape or description, any paper in there, any book account, any anything, to show in the slightest degree that Westcott or Carter received any money from Greene and Gaynor?*

A. *There is no such evidence.*

Q. *Does Mr. Johnson, in Exhibit* 319, *or in the evidence upon which he says* 319 *is based, claim or refer to any evidence of any character showing that Westcott or Carter ever received any money from Greene and Gaynor?*

A. *He does not.*

Q. Except in the instance of those five checks in 1896 and 1897, which are said to be a loan from Westcott to Greene?

A. That is true.

Q. Now, isn't it a fact that Mr. Johnson in creating Exhibit 319 has based his whole theory of any connection between Greene and Gaynor on the one hand, and Westcott or Carter on the other hand, on the alleged coincidences he says exist in view of the circumstance that certain payments by Greene and Gaynor are similar in date and amount to deposits made by Westcott or Carter?

A. I would not want to say that he has based his whole

theory upon those few instances where there is a coincidence, but I understand that these coincidences are the only evidence he has of any divisions, and except for those coincidences there is absolutely nothing shown on Exhibit 319, nor have I discovered anything in the record, that shows any connection between the deposits in Westcott's bank account, or with his brokers, and the contractors?

Q. Has any check been produced, or referred to, given by Greene or by Gaynor or by any of those people payable to the order of either Westcott or Carter, except the five checks where Westcott loaned the money to Greene in 1896 and 1897?

A. Those are the only checks.

Q. Are there any deposits that appear to be connected by any written paper between those parties?

A. There are none.

Q. Is there any evidence whatever referred to by Mr. Johnson, or on Exhibit 319, indicating that either Westcott or Carter cashed any check ever given by Greene and Gaynor? I am always excepting those five checks and the $21,000 check which was a repayment of that loan in 1896 and 1897?

A. There is no direct evidence of such fact, and there is absolutely *no* evidence, unless it be from the coincidences of deposits to which you have referred.

Q. Substantially all the moneys which Mr. Johnson seeks to trace through Exhibit 319 was money which came from Government checks which were deposited by Greene and Gaynor in some bank, was it not, except perhaps two instances where they cashed the Government checks at the sub-treasury?

A. That is correct.

Q. And after those checks were deposited in the bank account of Greene and Gaynor, or some of them, it became necessary, did it not, that checks or other charges should be made against that account in order to get the money out of the bank. Mr. Johnson has stated on Exhibit 319 all the checks and so forth, which he thinks proper with regard to how that money was paid out, has he not?

A. Yes, sir.

Q. Is there any of those checks that are payable either to the order of Carter or Westcott, as far as it appears?

A. There is no evidence to show to whom they were payable?

Q. There is no evidence that they were payable to Carter or Westcott, is there?

A. There is not.

Q. Is there any evidence that either Carter or Westcott cashed either of these checks?

A. There is not.

Q. Is there any evidence that either Carter or Westcott had either of these checks deposited to their credit?

A. *There is not only no evidence of that, there is positive evidence they were not deposited to their credit.*

Q. Is there any evidence that anybody who did cash those checks every paid any of the money to Westcott or Carter?

A. There is not, unless it be from the coincidence to which you called attention.

Q. In other words, I understand you to say that out side of these few coincidences where deposits by Carter or Westcott appeared to be similar in amount to the checks of Greene and Gaynor, there is absolutely no evidence of any kind, shape or description in either Exhibit 319, or in the matters referred to by Mr. Johnson that even indicate that any of the money received by the contractors, Greene and Gaynor, ever came into the hands of Westcott or Carter?

A. It is true, there is no such evidence except in the case of the coincidences.

Q. Mr. Johnson then used these coincidences as the basis of his Exhibit 319, did he not?

A. I assume that, because as that is all the evidence that he uses, of course he must have based Exhibit 319 on that. It is true his theory of the division of profits between the contractors and the defendant in this case is based upon the showing of a coincidence of deposits on the date of certain divisions.

Q. Isn't it based entirely on that?

A. Yes, sir.

Q. Now, that being so, having found a few of these coincidences, he then gets into deep water, does he not, and finds not only that his theory of coincidences don't work as to other transactions, but that it shows an entirely different mode of procedure and there is an en-

tirely different manner of handling the securities of these various parties?

A. He finds that the evidence of a division, which existed in a few cases, *entirely disappears at subsequent dates, or at other times.*" (Rec., 7173-77.)

"Q. Did Carter have or spend during all those years any other money except what came from his army income, and the small amount which he may have earned by permission of the Chief of Engineers, or his superior officers, by way of doing a little outside work for towns and villages, and so forth, in the engineering line?

A. And the income from his wife's estate.

Q. Besides the income from his wife's estate?

A. That appears to be all of the funds which he had.

Q. Now, all these things are shown, are they not, in detail upon Defendants' Exhibits 96-A, B, C, D, and F?

A. Yes, sir.

Q. If, then, the complainant claims there was any deal between Greene and Gaynor and Westcott, of any kind outside of this loan, which Westcott made to Greene in connection with the 1896 contracts, is there any documentary evidence that shows that Carter knew about it?

A. There is not.

Q. Is there any direct testimony in the present case stating that Carter knew about it?

A. I have not seen any, and I have examined all that is referred to in complainant's exhibits.

Q. If he did know anything about it, then the record shows no documentary evidence and no direct evidence, it must necessarily appear by circumstantial evidence?

A. Yes, sir." (Rec., 7768-69.)

That Westcott's liberality to Carter in giving him an allowance of $10,000 in 1894, of $12,000 in 1895, and a larger allowance thereafter, did not make Carter selfish, is shown by the fact that Carter gave to his mother, his two brothers, and his nephew, during those years, large sums of money, averaging nearly $4,500 per year. (Rec., 6234-35.)

The Attorney Account.

A strenuous attempt has been made by the complainant to make it appear that the account of Westcott during the years 1895-96, when Carter acted as Westcott's attorney, was not Westcott's, but was really the account of Carter.

That claim is absolutely disproved by the action of Westcott himself when the investigation of Carter's affairs first began; because Westcott prohibited Reed & Flagg from letting Carter have access to that "attorney account" in 1897, on the ground that it was his (Westcott's) account, and not Carter's account. This matter is shown by a letter of Reed & Flagg, written on October 21, 1897, eight days before Westcott gave Carter the bonds in Root's office,—(Rec., 6574)—and by Reed's oral testimony before the Board of Engineers (Rec., 889).

Much other evidence which is destructive of Westcott's attiude taken in New York in 1900, is to be found in the letters of Reed & Flagg which are printed in the volume of the exhibits relating to the money matters. (In the present record pages 6551 *et seq.*)

The currency deposits of 1895.

It is undisputed that during Westcott's absence in Europe from January, 1895, to May 11, 1896, Carter acted as Westcott's agent, under a written power of attorney from Westcott authorizing Carter to "buy bonds" for Westcott; and it is undisputed that during said period Carter took from Westcott's safe deposit box and deposited in Westcott's bank account or with Westcott's brokers, large sums of money and used it to buy bonds, etc., for Westcott; nor is it disputed that after his return from Europe, Westcott took possession of said bonds, etc., and himself sold part thereof, and had all of the remainder on hand in October, 1897.

Nor is it disputed that on October 26, 1897, while Westcott wsa in possession of said bonds, etc., he instructed his brokers, Reed & Flagg, to make a written staetment to Colonel Gillespie, which they did, that said transactions of depositing the money and purchasing said bonds, etc., were done by Carter on Westcott's behalf (Rec., 6576); and there is a written power of attorney in evidence, given by Westcott to Carter just before Westcott went to Europe in 1895, authorizing Carter "to buy bonds" for Westcott. (Rec., 11273.)

Moreover, both of Westcott's brokers, Reed and Flagg, testify that Westcott introduced Carter to them, as his son-in-law, in whom he had implicit confidence, and told them that Carter was to represent him during his absence, and that he desired them to recognize Carter in his stead, and they testify that after his return, Westcott ratified what Carter had done for him during his absence, and they both testify that everything Carter did was on Westcott's behalf.

The only question in issue is with regard to the time when that currency which Carter deposited for Westcott was put into Westcott's safe deposit box.

On this point the following evidence is entirely uncontradicted.

Carter testified before the Board of Engineers, at the very beginning of the investigation of the charges against him, that when Westcott went to Europe in 1895, he left "considerably more than $100,000" in currency in his safe deposit box, to be invested as Westcott's brokers might advise. (Rec., 6586.)

General George B. Davis, Judge Advocate General of the Army, says of Carter when he so testified (see Appendix, Board of Engineers):

> "His professional and military standing at the beginning of this investigation were of the highest, and his reputation for integrity was without stain."

Carter's testimony is corroborated by an entry in his diary, made at the time, that Westcott got $150,000 in currency on January 2, 1895, before Westcott went to Europe, and placed it in his safe deposit box.

It is further corroborated by the testimony of Greene who says that they paid out no profits whatever during Westcott's absence to any one, hence the currency deposited during Westcott's absence could not have come from Greene & Gaynor during Westcott's absence.

There is no pretense of any evidence to the contrary, except the mere fact that in April, May and June, 1895, Greene & Gaynor divided their profits into thirds, and checked Westcott's third out of their private bank account, either into some special account, or somewhere else.

Of course Greene & Gaynor would not wait a year until Westcott returned from Europe before they divided their government checks, but they would divide them just the same, and dispose of Westcott's third as Westcott had directed.

There is not the slightest evidence as to what they did

with it, except Greene's uncontradicted testimony that they did not pay it out to any one while Westcott was in Europe.

The complainant seeks, however, to overcome Greene's testimony that they did not pay out any of Westcott's profits during the absence of Westcott in Europe, and Carter's testimony that he did not receive it, by claiming that there is a "coincidence" between the dates when Greene & Gaynor received their government checks and the dates when Carter took money from Westcott's safe deposit box and deposited it with Westcott's bankers or brokers.

That "coincidence" arises in the following way. All the work of which Carter had charge at Savannah was paid for on vouchers which were made up at the end of each month. After the vouchers were ready, Carter paid them by checks in the usual manner, and Greene & Gaynor sent their checks to New York where they lived, and deposited them there.

As soon as the month's business was thus settled, Carter, whose wife was dead, often went to New York, as that period was his only leisure one, and he would reach New York about the same time that Greene & Gaynor's checks arrived there. Hence whatever business Carter transacted in New York would necessarily be done about the time Greene & Gaynor collected their government checks.

If the amount deposited by Carter at any such time had been the same as Westcott's share of Greene & Gaynor's profits, there might possibly be a suspicion that it came from Greene & Gaynor, but the amounts are entirely different, as will be seen from the following:

(a) In February, 1895, Carter made no deposit at all, not being in New York.

(b) In March, 1895, Carter took $20,000 from Westcott's safe deposit box and deposited it to Westcott's credit, but there is no indication that any profits whatever were divided at that date. On the contrary, John F. Gaynor received the only governmental check cashed at New York during that month, and did not deposit it, but evidently used that check as part payment on about $36,000 worth of government bonds he bought on that day. (See Gaynor's bank account.)

If the question be material as to where Westcott got the money he left in his safe deposit vault when he went to Europe, the evidence is as follows:

(a) Westcott told Carter that he got it at the Grand Central Station in New York, on January 2, 1895, from vari-

ous "inside" deals with the officials of the New York Central Railroad system.

(b) The amount which Westcott told Carter he received in that manner and at that place was $150,000.

(c) If it be assumed that the $150,000 was estimated as Westcott's share of Greene & Gaynor's future profits and was paid to Westcott by them before he left for Europe, then the amount of Westcott's profits from that date to the end, as claimed by the complainant, is almost exactly $150,000, less $28,000 ($49,000—$21,000) which Greene got back from Westcott afterwards and never returned.

(d) The amount deposited by Carter from Westcott's safe deposit vault while Westcott was in Europe was $150,000, less $36,172.92, *i. e.*, a net amount of $113,827.08.

(e) The amount of currency used by Westcott to make the final payment on the 8th avenue property was $35,550; so that if Westcott paid for that property out of the $150,000, there would have remained in his safe deposit vault $114,450, which is practically the amount which Carter found there and subsequently invested for Westcott.

(f) It may be said that Westcott paid for the 8th avenue property on November 27, 1894, whereas the did not get the $150,000 until January 2, 1895; but the facts concerning that matter are as follows: On September 10, 1894, Westcott did not receive $142,050 as his share of Greene & Gaynor's profits. On the contrary, Westcott testifies that he got only $100,000 from that division, and his testimony is entirely uncontradicted, and was produced by the government. Westcott testifies:

"Q. Was the amount exactly $100,000?
A. Yes, sir.
Q. Exactly?
A. Yes.
Q. And it was in bills?
A. Yes." (Rec., 11531.)

Westcott's testimony is corroborated by the testimony of C. N. Jordan, Treasurer of the United States at New York. Jordan testified concerning the $100,000 check which represented the profits of Westcott as follows:

"Q. Can you tell to whom the money of that check was paid over the counter?

A. I can most certainly swear that it was a person purporting to be John F. Gaynor." (Rec., 1080.)

It appears that another check was also cashed over the counter on that day, but it does not appear that it was paid to Gaynor, for Jordan testified about both checks, and does not so state, and Exhibit 225 shows that it was paid to the American Exchange National Bank, and doubtless was used to pay expenses of the work or money borrowed from that bank and paid with a government check like the $80,000 check was used in July, 1894. (See Ex. 319, Div. 17.)

The "one-third" profits of Greene & Gaynor for July, September, October, November and December, 1894, as per Exhibit 319, Divisions 17, 18, 19, 20 and 21, are a total of $210,947.78, but included therein is $142,050 for alleged profits in September, 1894. But Westcott distinctly testifies that he received only $100,000 of that alleged $142,050. He so testified before these suits were brought. If that $42,050 be deducted it leaves $168,897.78 as Westcott's profits for that period, and we find from Exhibit 319, Divisions 17 to 21, that Westcott deposited $168,222.78 of currency with his usual bankers and brokers, so that his deposits of currency were almost identical with his profits for that period.

Johnson places on Exhibit 319, Division 20, an alleged deposit of $35,550 to pay for the 8th avenue property and gives no source from which that money was obtained by Westcott except the $42,050 of alleged profits which he guesses Westcott ought to have received in September, 1897, over and above the $100,000 which Westcott says as a government witness was all he did receive.

But Westcott evidently borrowed that $35,550 to pay for the 8th avenue property, as he testifies that he bought it with his "own money" as distinguished from Greene & Gaynor money, and that he got back the money he paid for it "a month or so later," which would be January, 1895, the time when he received the $150,000. And besides Westcott testifies that he borrowed money prior to going to Europe in January, 1895.

Evidently Westcott borrowed the $35,550 to pay for the 8th avenue property, and repaid it early in January, 1895, out of the $150,000, leaving $114,450 remaining in his safe deposit vault when he left for Europe, and Carter invested $113,827.08 thereof while Westcott was in Europe.

CURRENCY DEPOSITS IN 1891 AND 1892.

Reference is made to the account of Greene as shown on Exhibit 330, and nothing is said about the account of Greene as shown on Exhibit 242.

If Exhibit 242 is examined, the following item appears on Greene's bank account:

"July 21, 1892 * * * Hegeman $11,000."

If Exhibit 593 is examined, which is the account of John F. Gaynor, it is found that on July 22, 1892, Gaynor paid out $10,000.

That is to say, on July 21, 1892, Greene paid out $11,000 to Hegeman, and on the next day Gaynor paid out $10,000 to some one.

Hegeman testifies that Greene and Gaynor were partners with him in a railroad contract during the summer of 1892 (Rec., 801, 803); and evidently the $10,000 paid out by Gaynor was Gaynor's part of the advances to Hegeman at the same time that Greene advanced to Hegeman the $11,000. But Johnson omits Greene's check, because he wants to claim that Gaynor's check went to Carter.

Then again complainant sets forth a check by Greene on June 8, 1892, for $2,500, but he omits to state the further fact that on June 6, 1892, there was paid out of the bank account of John F. Gaynor the sum of $2,575. This omission is evidently because there is every indication that the $2,575 paid out by Gaynor on June 6, 1892, and the $2,500 paid out by Greene on June 8, 1892, were also sent by them to Hegeman, so complainant suppresses the Gaynor check, because it wants to claim that Greene's check went to Carter.

John F. Gaynor opened an account with the American Exchange Bank on May 17, 1892, and during the following year, *i. e.*, up to May 17, 1893, Gaynor issued in addition to other checks, 29 checks, ranging from $1,000 to $40,000 each, all of which were paid to "Unknown."

Complainant picks out two of those checks, one for $10,000 and one for $2,500, and says it suspects Carter received the money from those particular checks because the payees thereof are "unknown," but it very carefully omits to suspect that Carter received any money from the other 27 large checks, all of which were also payable to "unknown," so it suppresses those 27 checks which were payable to "unknown" because if it mentioned those checks it destroyed its theory.

This method of falsification by suppressing the facts has

been followed throughout this entire case. For instance, Johnson claims there was a division on July 5, 1895, and, among others, he gives a check of John F. Gaynor for $10,000 which he says was paid to "unknown" on July 11, 1895, and he seeks to create the impression that Carter got some of that money. Yet there was another important check by Gaynor on that same day which was also paid to "unknown" and which Johnson does not mention; *i. e.*, on July 11, 1895, John F. Gaynor gave a check to "unknown" for $50,000, but Johnson suppresses that check, because it disproved his statements.

The $1,400 which Carter deposited on December 18, 1891, did not come from the sources suspected by complainant.

As a matter of fact, the $1,400 was part of the $5,000 which Mrs. Carter received from her father, and this $1,400 (with a $2,000 check of hers hereinafter mentioned) was used to buy $3,400 worth of Tow Boat stock, which was found in Mrs. Carter's safety deposit vault at her death. (Rec., 5470-71; 6325.)

The $2,500 deposited to Carter's credit on June 8, 1892, was not deposited by Carter at all. Carter was not even in New York when that deposit was made. (Rec., 5460.) That money was deposited to Carter's credit by Westcott in person, who gave it to Carter so that he might entertain at West Point the officers of the North Atlantic Squadron (Rec., 5459), whose guests Carter and his wife had been. (Def. Ex. 10-B.)

Complainant comments on the fact that Carter did not in fact entertain those officers at West Point, but it omits to mention the evidence which shows that at the last moment the Secretary of the Navy refused to permit the fleet to go to West Point. (Rec., 5955.)

The $10,000 deposited on July 22, 1892, belonged to Mrs. Carter, and was used to buy $10,000 of railroad bonds, which were found in her safety deposit vault at her death, and which were taken by Westcott on the ground that he had given her the money which paid for said bonds (Rec., 5471); and Westcott himself sold $5,000 of those bonds (General Electric) in April, 1893, through his former partner Van Deventer, which fact is admitted by Johnson on Division 1 of his Exhibit 319.

The $2,450 deposited on October 29, 1892, was deposited in Mrs. Carter's bank account.

That said $2,450 belonged to Mrs. Carter and not to Car-

ter, and that it came from Westcott, is shown by the follow
ing facts:

(a) It was deposited to Mrs. Carter's credit. (Ex. 594.

(b) Mrs. Carter drew her own check for $2,000 of it t
pay the balance due on $3,400 of Tow Boat stock. (Ex. 594.
(Def. Ex. 96-A.) (Rec., 5686, 6325.)

(c) That Tow Boat stock was found in Mrs. Carter'
safety deposit vault at her death. (Rec., 5471.)

(d) Westcott took possession of that Tow Boat stock o
the ground that he had given to Mrs. Carter the money whic
she had paid for it. (Rec., 5471.)

For details, see (Rec., 5714-17; 5720-22; 5615-16; 5617-18
5351-58; 5496-97; 5856-61; 5611-13; 5821-22; 6234-35; 5852-54
5767-70).

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THE EIGHTH AVENUE PROPERTY.

For the evidence concerning the gift of the 8th avenu
property to Carter by Westcott, and its subsequent history
see (Rec., 5356-57; 5672; 5788-90; 5682-84; 6281-22; 6287-88
6072).

For the testimony of Charles McPherson concerning th
8th Avenue property, see (Rec., 7707-15; 7035-38).

For evidence as to the Towboat, Brush Electric, Lighter
age, Brewing and Hunting Island stocks, see (Rec., 5685-90
5802-04; 6124; 6126; 6141-42).

—35—

CARTER'S TESTIMONY.

Certain railroad bonds were purchased after Carter's wif
died on December 7, 1892, viz.: Erie, Morris & Essex, Wabash
Ches. & Ohio, and C. & E. Ill., etc. (Rec., 9552-61.)

On May 2, 1893, Robert F. Westcott, who had taken posses
sion of the estate of Carter's wife, gave Carter a check fo
$489.86, which was the balance in his hands after certain trans
actions had taken place, in connection with the foregoing
bonds. Westcott always kept said bonds, and did not delive
them to Carter, but in May, 1897, he gave Carter credit fo
what remained of them (at their face value) in connection wit
the Orange real estate. (Rec., 5824; 5766.)

The estate of Carter's wife came to her originally as

gift from Westcott, and at her death Westcott took possession of it. (Rec., 5351-52.) There is a dispute as to whether Carter was her sole heir, under the laws of New York, where the property was located.

Carter raised no such question with Westcott, but let Westcott take possession of her estate. A few days after Mrs. Carter died, Westcott gave Carter $2,500 and, soon afterwards Carter paid $1,106.25 towards the bonds. The balance of the cost of the bonds was paid out of the estate of Carter's wife.

Westcott took and kept (or sold) all of these bonds, as has been already stated. Westcott did, however, give and deliver to Carter $3,500 of Towboat stock, shortly after Carter's wife died. (Rec., 5528.)

When Carter testified before the Board of Engineers and court martial, he treated those bonds as being Westcott's bonds when they were bought.

In the present suits, evidence has been found among Westcott's private papers, showing that Westcott treated those bonds as Carter's bonds, and Carter now accepts Westcott's view that the bonds were bought for him (Carter). The complainant, therefore, says Carter's present claim is inconsistent with his former testimony.

CHARLES MCPHERSON testifies that Westcott treated those bonds as Carter's, *but that Westcott nevertheless always kept those bonds:*

"Q. In regard to these bonds which came from Carter's wife's estate, the testimony and evidence show that the money that was Carter's wife's estate was a gift to her by Westcott, does it not?

A. Yes, sir.

Q. And that when she died Westcott went to the safety deposit vault and took it back?

A. Yes, sir.

Q. Then he reinvested and changed some of the things around, and on May 2, 1893, he gave Carter a check for what would be the balance, if he was accounting to Carter for Carter's wife's estate?

A. Yes, sir.

Q. And included in that settlement were all of these bonds to which Mr. Erwin refers?

A. Yes, sir." Rec., 7802.)

"Q. And you have treated them as belonging to Carter, because Westcott gave him a check for the balance of

the entire estate, and because Westcott accounted to him for the coupons from time to time?

A. Yes, sir.

Q. But the physical possession always remained in Westcott, as far as it appears, did it not?

A. Yes, sir.

Q. And eventually Carter's claims to the bonds, whatever it may have been, was canceled, was it not, by that Orange real estate?

A. Yes, sir." (Rec., 7805-06.)

ROBERT NELSON, the Vice President of the International Audit Company of Chicago, testifies that under the circumstances there is no inconsistency in Carter's testimony, which is not entirely reconciled by the circumstances. Nelson testifies:

"Q. Before the Board of Engineers and court martial Carter had no access to Westcott's checks or bank account, or to the broker's account in Westcott's name, or to any of Westcott's books or papers, or to Westcott's testimony. In the present suit we have access to such of it as Mr. Erwin has produced. In the absence of that check of Westcott of May 2, 1893, wherein he balanced up Carter's wife's estate and sent Carter a check for the balance; in the absence of Westcott's bank account showing how he treated these matters; and in the absence of Westcott's broker's accounts showing how these things were treated; it would be an entirely different situation, would it not, from the present one, if Carter testified without any information of that kind, as compared with the present case when all that information is before the court?

A. It would be an entirely different situation.

Q. And it would not be strange, would it, if Carter was inaccurate or indefinite or mistaken as to what Westcott really did intend by those transactions, in view of the fact that he had no access to either Westcott, or to these checks or broker's account, or anything else of that sort?

A. Yes, I should think the absence of those accounts and the situation he would find himself in, would be liable to lead to confusion in his mind.

Q. Now, as a matter of fact, these Morris & Essex bonds, &c., were bought by Westcott, were they not?

A. Yes, bought by Westcott.

Q. Paid for by Westcott from his own account?
A. Yes, sir.
Q. Carter had no access to that account; he had no access to Westcott's bank account; he had no access to Westcott's checks, and Westcott refused to testify. Now, under those circumstances, would it be strange if Carter was unable to state correctly the history and circumstances attending those bonds?
A. No, it would not be strange if he was so unable to testify.
Q. Unless he had kept accurate books and memoranda himself, wouldn't it be very difficult for him to testify accurately with regard to those transactions?
A. It would, sir.
Q. This account that is made up here is based very largely, is it not, upon this Westott check to balance off Carter's wife's account, and upon the broker's account, upon the Union Trust Company's account, and various other transactions of Westcott's?
A. Yes.
Q. If you did not have access to those, it would be a very difficult matter, would it not, to determine exactly what Westcott considered with reference to those bonds, as to whether he considered they were Carter's or whether he considered they were his own, or what he intended by it?
A. In the absence of these exhibits, I should say it would be impossible.
Q. In making up these statements, Exhibit 96-A, they are based very largely, are they not, upon what Westcott considered the transactions to be; that is to say, he gave a check to balance Carter's wife's estate, and by that check he recognized Carter's claim, certainly to the amount of the check, and it is based also upon the fact that he collected those coupons and accounted to Carter for them, &c.,—it is based very largely upon that, is it not?
A. That is true." (Rec., 7979-81.)
"Q. Mr. Nelson, suppose Robert F. Westcott, without Carter's knowledge, had made out a deed to a piece of real estate, and without Carter's knowledge had put it of record, and Carter had been on the witness stand subsequent to that time without knowing about the deed, and was asked if he owned that property and stated that he did not; and then a year or two afterwards you are

making up an account as an expert accountant, and you find the deed of record, would you follow Carter's testimony, or would you follow the deed?

A. I would follow the deed of record.

Q. Now, at the time Carter testified, he had no access to Westcott's books or papers or checks or anything of that kind, and didn't know how Westcott had treated those matters; now, in the present case we have access to those things, and we find out how he treated them; we find a check by Westcott recognizing Carter's right to his wife's estate, and to the bonds bought thereunder; which would you follow, in making up an account as an expert accountant, the testimony Carter gave when he did not have access to that check and those papers, or the papers themselves as they now come in?

A. The papers themselves as they now come in.

Q. *Would there be any inconsistency between the two, except the fact that Carter did not know that Westcott had done those things, and thence did not know what his title was?*

A. *Yes, that would explain the inconistency.*" (Rec., 7983-84.)

Estate of Carter's Wife.

In the very beginning of these charges, on Oct. 27, 1897, Carter testified about his wife's estate, as will be seen from the following extracts from the official report of the Board of Engineers:

Before Carter had ever been discredited, and before he received the securities from Westcott in Stimson's office on Oct. 29, 1897, he testified before the Board of Engineers as follows: (See record, page 923 *et seq.*)

"Q. January 27, 1897, you proposed to invest $55,000 to $60,000 in Orange, New Jersey. * * * Will you explain where you expected to get that $55,000 to $60,000?"

Then follows considerable explanatory testimony and on page 924, Carter says: "I had some investments in Savannah. I had been saving up little by little for a great many years, and those were mine." (He means the Towboat stock, etc.)

Then on page 924:

"Q. Explain to the board how you got the part you turned over to him (to Westcott).

A. The part I turned over to him—a part of it came through the intermediary of my wife, and part of it came direct."

Then on page 926 Carter explains as to Towboat and Lighterage and Brush Electric and Brewery stock.

Then on pages 926-27:

"Q. Will you tell us in what form the property came to you from your wife and through your wife?"

"A. It came in presents to her from her father."

Then on page 927:

"Q. * * * What was the form of that that came through your wife, was it stocks or what?"

"A. No stocks ever came through my wife. It was either money or bonds. I don't think any real estate. I think nothing except money or bonds came through her."

See Defendants' Exhibit 96-A (Rec., 9549-61), showing from Westcott's checks, bank account and brokers' accounts, the amount of "money and bonds" from Mrs. Carter's estate, and that it was invested in said 40 bonds, and that on May 2, 1893, Westcott gave Carter a check for the exact amount of the balance, *i. e.*, $489.86. See also the testimony of Nelson and McPherson in Reference to the evidence, page 287, *et seq.* See also that the currency deposits mentioned in Johnson's Exhibit 319, Divisions 2, 3 and 4, came from Mrs. Carter's money. (Rec., 9555-9.)

Note. The $3,500 of Towboat stock, costing $3,400, and paid for with $1,400 of Mrs. Carter's currency and her check for $2,000, was not received by Carter through his wife, but was taken by Westcott, and $2,900 and $500 were given by Westcott to Carter on April 14 and 15, 1893, and then on June 8, 1893, Westcott made Carter a present of that stock. (Rec., 9558-10.)

Then follows, on page 928, testimony as to currency in Westcott's safe deposit box when he went to Europe in 1895.

See also written statement to the Board that Westcott gave his other daughter, Mrs. Conquest, $70,000, and that the currency in Westcott's safe deposit vault was over $100,000. (Rec., 6586.)

See also Carter's testimony in present case, printed page 5791 of the record.

See also defendant's answer that part of Orange property may have been paid for with the estate of Carter's wife. (Rec., 133.)

Concerning the moneys delivered to Carter by Westcott in

1893, in settlement of the estate of Carter's wife (Ref., 299, *et seq.*), the Circuit Court held:

"It may be as defendant insists: that it came as a part of his wife's estate, and was, as such, delivered to him by Westcott." (Rec., 386.)

The Circuit Court of Appeals did not disturb that finding.

—36—

THE GORDON LOAN.

For the evidence relating to the Gordon loan, see (Rec., 5364; 5641-42; 5648-50) (Rec., 7218; 7078-81).

That it is customary for men who make loans to desire the endorsement of the borrower on the check making the loan is shown by the following testimony:

CHARLES MCPHERSON testifies:

"Q. Mr. McPherson, is it customary for men who are making loans to third parties to have the money which they loan evidenced by their own check and payable in such way that the borrower's signature is on the back of the check which comes back to the man making the loan?

A. It is with a great many men who loan money, to insist on that." (Rec., 7080.)

ROBERT NELSON, testifies:

"Q. The record shows that Westcott gave his check to Carter's order for the $10,000 and that Carter endorsed the check to Beirne Gordon, that the check bears Beirne Gordon's endorsement, and that the notes were payable to the order of R. F. Westcott. It also is shown that in making this loan Westcott desired that the check which made the loan should bear the endorsement of the man who borrowed the money, namely, Beirne Gordon, and that Westcott's check for the purpose of making that loan was received by the borrower, Beirne Gordon, endorsed by him and the money obtained by him on that check. Have you had any experience as to whether it is a usual custom with lenders, or of money lenders, to make the check which loans the money payable to the order of the man that borrows the money, so that the borrower's endorsement may be upon the back of the check as a voucher to show conclusively that the borrower received the money?

A. Yes, sir, I should say it was practically a universal rule." (Rec., 7837.)

—37—

WESTCOTT'S ALLEGED TESTIMONY.

For the evidence showing the complainant's solicitor attempted to introduce Westcott's alleged testimony, see (Rec., 6299-6301).

The reference supporting the assertion that if Westcott testified as the complainant's solicitor claims he did, he committed perjury, have already been given in Request No. 37, and need not be repeated here.

—38—

CARTER'S LETTERS TO GREENE AND THE CURTIS MATTER.

With regard to the letters between Carter and Greene and Gaynor, the facts are that Greene had been a Captain of Engineers, and Carter was an engineer officer, and they had thus become better acquainted than men who meet as strangers. (Rec., 8366.)

Engineer officers of the United States army are entitled to believe that other engineer officers of the same army are gentlemen and honest men, and to treat them accordingly.

The fact that Greene had voluntarily resigned from the Engineer Corps did not change the situation, except where Greene's interests and the interests of the Government were opposed to each other.

Carter continued to treat Greene as a brother officer, in all matters outside of government contracts, and the fact that he did so affords not even a reasonable suspicion that they were plotting to rob the United States.

Army officers (as well as business men) can be decent towards each other, and even discuss taking an interest in some outside venture, without being fairly suspected of deep-laid designs to rob the United States.

But there are some men who suspect crookedness from the most trifling and harmless transactions between a man and his friends or relatives, and who torture innocent and well-intentioned actions into alleged evidence of hideous crime.

In the present case, there is no serious pretense that either Carter or Westcott ever received anything from Greene and

Gaynor, either before or after the big contract. That big contract was signed by the Chief of Engineers on Nov. 9, 1892.

The letters between Carter and Greene and Gaynor are years before that time. Senator Edmunds, in his report, became confused as to those dates, hence special attention is now called to those letters and their dates.

Those letters as as follows:

(a)

Over 7 years prior to the big contract, *i. e.*, June 21, 1885, Carter wrote a letter to Judge Brawley of Charleston, asking about the phosphate laws of South Carolina. Carter did not know Judge Brawley, and as Greene knew him, Carter got a letter from Greene to Brawley, which he enclosed. (Rec., 8363.)

(b)

Over 7 years prior to the big contract, *i. e.*, on Nov. 2, 1885, Carter wrote a letter to Gaynor, calling his attention to pine lands in Georgia, which could then be bought for 75 cents per acre.

In the letter Carter speaks of a "project," which the evidence shows was a plan to scatter bait over some old rice fields so as to shoot ducks. (Rec., 8363.)

Carter also says in the letter that he is "whooping up the convention." The evidence shows that this was a convention opposed to taking river and harbor work away from the Corps of Engineers. (Rec., 3804.)

When that letter was written to Gaynor, Greene and Gaynor had no contract with the United States. (Rec., 8363.) (See, also, An. Rep. C. E. 1886.)

(c)

Over 6 years prior to the big contract, Carter's father was dying, and was worried over a mortgage on his homestead. Carter's brother asked Carter to send him the money to pay it off. Carter did not have the money, so he asked Gen. Gillmore, who was his commanding officer, to lend it to him. Gen. Gillmore did not have the money, but told Carter to get it from Greene. Carter saw Greene, who sent the money ($1,600) to Carter's brother, who used it to pay off the mortgage. (Rec., 5714-15.)

This was in April, 1886, when Greene and Gaynor had no

contracts with the United States. (Ex. 22.) (An. Rep. C. E. 1886.) (Rec., 3651.)

In 1887, Carter's father died, and Carter assumed the payment of that loan to Greene. At that time Greene and Gaynor had a contract with the United States, so General Gillmore advised Carter to pay off that loan, which Carter did as soon thereafter as he could do so out of his army pay, making the final payment of $299.50 ($200 balance of loan and $99.50 interest) on January 17, 1888. (Rec., 5716; 8364.) (Ex. 22.)

During the entire period covered by that loan Carter did not have charge of any work, but was merely an assistant to Gen. Gillmore.

Carter was first put in charge of river and harbor work on April 24, 1888, which was 17 days after Gen. Gillmore died, and more than 3 months after the loan had been paid. (Ex. 13.)

(d)

FROM NOVEMBER 26, 1887, TO JANUARY 16, 1889, GREENE AND GAYNOR HAD NO CONTRACTS WITH THE UNITED STATES. (An. Rep. C. E. 1888, pp. 1009; 1052.) (Ex. 76.)

(e)

During the year 1888 (*when Greene and Gaynor had no contracts with the United States*) Carter wrote several letters to Greene and received one letter from him.

Those letters from Carter to Greene related to a gas company, an air jack, a marble quarry, a paving company, some pine lands, the price of stone, etc.

These matters, such as the air jack, marble quarry, etc., were local ventures of prominent Savannah men, who desired to interest Carter and Greene therein, because they were engineers. (Rec., 5717; 8365-72.)

The one letter from Greene to Carter, stated that Greene and Gaynor were going to Chili, to get $6,000,000 worth of work, and wanted Carter to "hurry up" his dredging work, so that they could have a chance at it before they went to Chili.

Greene and Gaynor had bid on this dredging, and Carter had rejected the bids, Greene suggested higher prices for the dredging, but Carter would not agree to that, so Greene and Gaynor did not bid on the dredging again. (Rec., 8369-70.)

Carter had nothing to do with the Chili scheme, and Greene

declined to go into any of the Savannah matters. (Rec., 8369-70.)

The only letter from Carter to Greene about any of those matters, which was written when Greene and Gaynor had any contract with the United States is a letter of May 26, 1889.

In May, 1889, phosphate was discovered in Florida, and Gen. W. W. Gordon, a very prominent citizen of Savannah, asked Carter to join him in looking into it. (Rec., 8370.)

When the phosphate matter was up in 1885, Comer, Gorden, Carter, Greene and Gaynor had talked of going into it, and so when it came up again, in 1889, Carter felt that the same parties should have a chance at it; hence he wrote to Greene, May 26, 1889, with regard to it, and said among other things as follows:

> "I saw Gordon yesterday and told him I wished the same parties as before, viz., you, John, Comer, himself and myself in it. He objected, said he wished to share equally with me but didn't wish others, &c.; said this was a new deal, &c." (Ex. 27.)

Thereupon Carter, feeling in duty bound so to do, offered to give Greene and Gaynor a part of his own share, and stated to Greene in the letter that he (Carter) and Gordon had each put up $500, and were to put up $2,000 more each, and that if Greene and Gaynor would put up that $2,000, they could have that part of Carter's interest; and Carter urged Greene to do so, but Greene declined, and that was the end of it. (Rec., 8370-71, 5926, 5906.)

(f)

The foregoing letters are claimed by the complainant to be the principal part of the alleged "mass of incriminatory evidence," found in Carter's private papers, when they were seized by the Government in 1897!

(g)

As to Carter's letter to Bassett, of March 30, 1891, and that it had nothing whatever to do with Greene and Gaynor, see (Rec., 8375).

(h)

As to Carter's letters concerning proposed railway contracts, and that they had nothing whatever to do with Greene and Gaynor, see (Rec., 8379).

See also the testimony of W. W. Hegeman on this subject. (Rec., 3114-16; 3118-19.)

See also the testimony of Senator Depew on this subject (Rec., 2409-10).

(i)

As to Carter receiving letters from Mr. McNeill in 1888, in regard to some proposed railway matters in Ohio, see (Rec., 5931-33).

(j)

As to Greene paying money to a woman, see (Rec., 5719-20). (Rec., 632.)

(k)

As to Carter's letter to Greene about the Curtis matter, written at the suggestion of General Alexander, see (Rec., 8372).

(l)

The decision of Inspector General Hughes on the Curtis charges is given in full in the Wyman record, (Rec., 8968-81).

CARTER'S LETTERS, ETC.

Repeated attempts are made by the complainant to confuse the court with regard to Carter's letters to Greene and Carter's letters as to railroad work, etc.

Carter's letters to Greene, which were in 1888, and 1889, are considered in Defendant's References, page 457, *et seq.*

The letters regarding railroad work are as follows:

(a) On January 22, 1891, Greene wrote to Carter regarding the elevation of tracks at Buffalo by the New York Central (Rec., 3648), and asked Carter to get Webb to write Vanderbilt about it, as Greene wanted to get the contract. Carter did not do so. (Rec., 3648.)

(b) Chauncey M. Depew testifies that Westcott tried to get the New York Central to give Westcott a contract to do all the construction work for the New York Central Railroad, and that Westcott would have had Carter resign from the Army and go into that work. (Rec., 2408.)

On or about March 27, 1891, Carter discovered that the principal work in that line, Utica to Montreal, *i. e.*, Herkimer —Poland, had been let to Mr. Westbrook and that Westcott

was not in it, and Carter then wrote to Rossiter, regretting that things had not materialized.

(c) Nine days after Carter wrote the foregoing letter to Rossiter he wrote to Webb asking a chance at the "Tupper Lake" extension, if one was to be built. Carter refers to his "associates," and the foregoing letter shows that he means Robert F. Westcott.

Westcott and Carter intended to employ W. W. Hegeman who had built 200 miles of the St. Paul Road (Rec., 8379), as assistant, if they got the New York Central contracts, but they did not get any of them.

(d) On October 9, 1891, on January 20, 1892, and on January 22, 1892, Hegeman telegraphed and wrote to Carter regarding a railway matter in Ohio. (Rec., 3116.) Hegeman testifies that Greene and Gaynor had nothing to do with it and had no interest in it. (Rec., 802.) This Ohio deal of Hegeman had no connection with the Cincinnati deal that MacNeill wrote to Carter about three years before, *i. e.*, in 1888 (Rec., 3116.)

None of those Ohio matters ever materialized. (Rec., 3117, 801.)

Hegeman testifies that Greene and Gaynor never had any interest in any of those matters. (Rec., 799.)

(e) In Hegeman's telegram of October 9, 1891, he says among other things "Captain wants Fernandina check," meaning a check due for work done at Fernandina.

The check referred to was one of a series received by Greene and Gaynor in September, October, November and December 1891, which we have seen were divided equally between Greene, Gaynor and Bangs.

(f) Hegeman testifies that his office was next to Greene's (Rec., 3117), and that at one time he had a desk in one of Greene's offices (Rec., 799), and that when he was telegraphing Carter, Greene asked him to add to his telegram that request for the check. (Rec., 3119.)

It appears also that Hegeman sometimes used Greene's letterheads, and once or twice he used the letterheads of the Empire Construction Company (Rec., 3117), but he testifies that he never had any interest in that company. (Rec., 802.)

(g) On February 8, 1892, Hegeman, who had been trying for a year to get some railroad work, obtained a letter from Carter to Rossiter, in which Carter asked for a letter of introduction to Webb. In that letter, Carter refers to the attempt of Westcott, Carter and Hegeman, a year before, to get some

New York Central work. Hegeman testifies that he never presented the letter. (Rec., 3117.) He also testifies that Greene and Gaynor had nothing to do with the matter, and had no interest in it. (Rec., 799.)

(h) Hegeman testifies that he had nothing further to do with Carter (Rec., 800; 804), but that later on, *i. e.*, in the working season of 1892, he got a contract, through one of his former "foremen," to "ballast" a small part of the Adirondack railroad. (Rec., 803; 3115.) Hegeman testifies that Carter had nothing to do with that matter. (Rec., 3115.) Hegeman needed money to do that ballasting, and obtained it from Greene and Gaynor. (Rec., 801.)

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THE GOODYEAR CHARGES.

The evidence in support of the statements made about Goodyear has already been referred to in Request No. 39, and need not be repeated here.

—40—

THE ALLEGED OPPRESSION OF A. J. TWIGGS.

The evidence showing that Twiggs was never oppressed by Carter has already been given (by quotation or reference) in Request No. 40, and need not be repeated here.

LYMAN E. COOLEY, a prominent civil engineer of Chicago, testifies there is no comparison between the character of the work at Augusta, where Twiggs had his contract, and at Savannah, where work under the big contract was done:

> "Q. This contract that Mr. Erwin has just referred to, with Twiggs, is for work to be done in the Savannah river, near Augusta, where the water is shallow, and as I understand it, the fascines were to be used for the revetment of the river banks; the fascines called for by the big contract at Savannah were to be used where the depth of water was such that they desired to get a depth of 26 feet in the channel, and they were used for the purpose of either foundations, or work in connection with foundations, for the purpose of catching silt; would there be any comparison between the character of the two kinds of work?

A. *The object is quite different; the purpose is diffe*
ent.

Q. Well trimmed for the purpose of revetting th
banks and well trimmed for the purpose of catching sil
would be entirely different things, would they not?

A. Yes; the difference is more in the application of th
device. In both cases we seek to make a basketwork pro
position of it that will catch the silt. In case of bank pro
tection it is desired that the brush work become part o
the shore and shall fill up and be held partly by the sil
in the interstices. In the case of the training walls yo
are virtually building up a shore line and largely of brus
work in which the spaces shall be filled in with deposits.
(Rec., 8587-88.)

—41—

GAYNOR AND TWIGGS.

The evidence showing that Twiggs was permitted to do
much larger percentage of brush work (instead of *vice vers*
as is charged) has already been referred to in Request N
41, and need not be repeated here.

—42—

CARTER'S REPORTS TO THE CHIEF OF ENGINEERS.

The work done by an Engineer Officer, in charge of rive
and harbor work, is done largely through his assistants, sinc
it is impossible for him to be present at all points in a distri
which covers several hundred miles of river or coast work.

Under such circumstances, the custom arose of not makin
any official report of absences from the official station, whe
the officer was attending to his duties.

Carter followed that custom, with the permission of th
Chief of Engineers; and the complainant's solicitor now find
it very suspicious.

For the evidence relating to that matter, see (Rec., 594
47; 5956-57; 5984-85; 5992; 6169-72).

GENERAL T. L. CASEY, the Chief of Engineers with who
Captain Carter arranged to make his reports as has been e
plained, died before any charges were made against Carte
(Rec., 904), but General W. P. Craighill, who was Carter
Division Engineer, and who succeeded General Casey as Chi

of Engineers, testifies that he was aware of the arrangement Carter had with General Casey.

General W. P. Craighill testifies:

> "A. * * * I do recollect a conversation I had with Captain Carter before I became Chief of Engineers, perhaps more than one, in which he told me of an understanding that existed between himself and General Casey, while he was Chief of Engineers, in reference to the Captain Carter's absence from his station." (Rec., 906.)

That Carter did not deceive his superiors as to his whereabouts is shown further by the following:

Carter was tried by court martial for deceiving the Secretary of War on May 25, 1897, with regard to his whereabouts, because a telegram was sent from Carter's office in Savannah to the Secretary on that day, whereas Carter himself was in New York at the time.

Colonel T. F. Barr, the judge advocate of the court martial, abstracted from Carter's private papers (which he had in his charge) an original telegram from the Secretary of War to Carter on that date, which proved the Secretary was not deceived as to Carter's whereabouts, but was actually telegraphing to him in New York on that very day. (Carter's telegram from Savannah was simply to keep a record in the Savannah office.) (Rec., 3679-80.)

On February 27, 1898 (having suppressed that telegram), Barr pressed his charge against Carter before the court martial. (Rec., 2185.) (Rec., 8387.)

Two months later, *i. e.*, April 10, 1898, *Carter's counsel accidentally discovered that Barr had that telegram from the Secretary of War to Carter, and he compelled Barr to produce it* (Rec., 3686) (Rec., 8387); *whereupon Barr abandoned the charge which for two months he had been pressing against Carter, seeking to secure his conviction therefor.* (C. M. 4801.) This matter was proved, November 29, 1905. (Rec., 8388.) Barr went on the witness stand, December 29, 1905, and did not deny it. (Rec., 8856.)

—43—

The Hutchinson Island Matter.

When Captain Carter made his estimates for widening the river at Savannah, by removing a portion of Hutchinson Island, the total cost was set at $145,000. That cost was com-

posed of two items; the first being the work of excavation, etc., for which a contract was entered into for $100,000 (An. Rep. C. E. 1893; p. 1545); the second being land damages, etc., of $45,000 (An. Rep. C. E. 1890; p. 1262).

The principal land owner, one Willink, had agreed to accept the sum of $27,500 (C. M. 1320).

When Captain Carter desired to begin the work, this same man Willink demanded excessive rentals or damages, so that the total cost would have been about $50,000 greater than the estimate, *i. e.*, about $195,000, instead of the $145,000 of the estimate; hence Carter obtained the desired cross-section in the river by deepening, instead of by widening, the river.

For evidence of the charges by Gillette against Carter with respect to this matter, see (Rec., 560-61) (Rep. to B. E., pp. 32-33).

For the evidence of Carter's conviction on Gillette's charges, etc., see (Rec., 8232-37).

For the evidence showing that at the time Gillette had Carter courtmartialed for telling a falsehood in saying the cost of the Hutchison Island work, due to excessive damage claims, would have been as much as $195,000, *he (Gillette) had in his possession written documents showing that one man alone had demanded damages of* $198,259.92, see Willink's suit in the Court of Claims, with Gillette's written report thereon, which is Defendant's Exhibit 154. That claim and Gillette's report are copied in the Wyman record (Rec., 8938-46).

—44—

THE EMPIRE CONSTRUCTION COMPANY.

There is introduced by the complainant an old stock book of the Empire Construction Company, which company in 1891 did the work on the Orange sewers.

That old book shows the company had in all 2,000 shares of stock, standing as follows:

B. D. Greene	1980	Shares.
J. F. Gaynor	5	"
E. H. Gaynor	5	"
J. E. Chandler	5	"
A. M. Newton	5	"

That stock book, which was among Captain Carter's private papers in 1897, is now introduced as proof of a conspiracy to defraud the Government, which is alleged to have been

entered into by Greene and Gaynor and Captain Carter in 1891.

That stock book came to be among Captain Carter's papers in the following manner:

JOHN F. GAYNOR testifies about that stock book:

"Q. Who had charge of the stock book?

A. My brother, Will Gaynor, had it. We went there and worked at that, and he has had all the papers." (Rec., 937.)

W. T. GAYNOR testifies:

"This was a close corporation, and all the stock owned by three people, namely John F. Gaynor, Captain B. D. Greene and A. M. Newton. A few shares stood in the name of others for the purpose of organization. I was the treasurer of the company, and had possession of all the books, I must have left the stock book at Captain Carter's office inadvertently. At any rate, Captain Carter had no interest in the company, directly or indirectly." (B. E. Ex. 123-G.)

J. E. CHANDLER, an attorney of 20 years' standing in New York, and the Secretary of the Empire Construction Company (Rec., 3450), testifies:

"Q. Who were the real owners of the stock of the Empire Construction Company? Who were the real parties in interest in the Empire Construction Company after its organization was completed, if you know?

A. B. D. Greene, A. M. Newton, and John F. Gaynor.

Q. And what proportion did these three men have in that company?

A. An equal one-third." (Rec., 2451.)

"Q. Did Captain Carter ever have anything to do with the Empire Construction Company?

A. Not to my knowledge.

Q. If he had had anything to do with that company, would you have known it?

A. I certainly should." (Rec., 2457.)

"Q. Examine the last certificate for 1980 shares, and state if that certificate is of any validity as it stands?

A. I should say not.

Q. Why not?

A. It is not attested under the seal of the company by the secretary.

Q. You being the secretary?
A. Yes.
Q. Has that certificate ever been issued?
A. It has not." (Rec., 2457.)

"Q. As secretary of the Empire Construction Company, you were entitled, were you not, to the custody of this stock book?

A. Under the bylaws, I presume the custody of that book was entrusted to me." (Rec., 2462.)

The Witness: "I think I handed that book to one of the Gaynor boys, I mean William or Edward." (Rec., 2462.)

B. D. Greene testifies:

"Q. Did Captain Carter ever own any stock in that company?
A. Never.
Q. Did he ever have any interest in any way, shape, form or manner in the Empire Construction Company?
A. Never.
Q. Did he ever draw any dividends from it?
A. Never.
Q. Was any money ever paid from the Empire Construction Company in any way, shape, form or manner, directly or indirectly to Captain Carter?
A. Never." (Rec., 3566.)

"Q. And who were the beneficial owners of the stock in that company?

A. John F. Gaynor, A. M. Newton and myself." (Rec., 3566.)

"Q. Did it complete its Orange contract?
A. It did.
Q. Has it ever taken another contract?
A. It has not.
Q. Did it win or lose on the Orange contract?
A. It lost." (Rec., 3567.)

"Q. The 1980 shares was practically the capital stock of that company?

A. Yes, sir." (Rec., 3568.)

"Q. Do you know for what purpose the stock of the Empire Construction Company was put into that shape?

A. I put it in that shape because in case of my prolonged absence from the country, or my death, I wanted to leave it so that Colonel Gaynor could manage the affairs of the company without any delay; and the secre-

tary, in signing that certificate, could put in whatever name was necessary." (Rec., 3567.)

GEORGE W. BROWN, a civil engineer, who graduated from the University of Wisconsin (Rec., 3295), testifies:

"Q. Do you remember when Captain Carter's private papers were being packed in July, 1897?

A. Yes, sir.

Q. Who packed them?

A. I packed his private papers myself.

Q. Do you remember seeing, in packing those papers, the stock certificate book of the Empire Construction Company?

A. I do.

Q. What about that; what do you remember about it?

A. I remember putting that book into the file case.

Q. Where did you get it?

A. Just where I got it I could not say now. But I remember having the book, picking it up and putting it into the file case, and my attention was called to the book itself. How I came to remember it, I was standing then in the doorway of Captain Carter's room in the office,—it was the doorway which led to the room between Captain Carter's room and the room occupied by the clerks. I at that time—

Q. Was it handed to you, or did you pick it up yourself?

A. It was not handed to me, I don't think." (Rec., 3531.)

"Q. Why did you put in with Captain Carter's papers?

A. I was putting everything I could get hold of into the case; I was putting everything I could find into the cases; and at the last, everything which was left out, which had not been excluded by Captain Carter, I put into that case." (Rec., 3303.)

"Q. Did you have any talk with Captain Carter about that book?

A. No, sir.

Q. You knew it was not an office book, did you not?

A. Yes, sir.

Q. Why then did you put it among Captain Carter's private papers?

A. For want of knowledge what else to do with it. I supposed it belonged to him, and that it should go in there." (Rec., 3303.)

"Q. Was there any concealment made of the private papers of Captain Carter when you were packing them?

A. None at all.

Q. You had access to them all, did you not?

A. I had access to them all.

Q. In the absence of Captain Carter?

A. Whether he was there or not." (Rec., 3305.)

For further details, see (Rec., 5718; Rec., 8376-78.)

—45—

THE HIRT MATTER.

For evidence as to the Hirt matter, see (Rec., 3673-77.)

MAJOR GEORGE W. GOETHALS, Corps of Engineers, who was assistant to the Chief of Engineers, testifies:

"Q. Did you ever have any conversation with Capt. Carter in the later part of 1896, or early in 1897, relative to certain moneys collected by him for the use of a snag boat, commonly known as the Hirt money?

A. * * * The question that he put to me was, could this money be deposited in the Treasury to the credit of the appropriation? I told him that I didn't think that it could." (Rec., 3337.)

"Q. Did he express his intention as to what he would do with the money?

A. He stated that he would then keep it, and when the boat went up on that stream again, he would use it for paying the boat's crew, or in connection with that appropriation, that stream." (Rec., 3337.)

For evidence that Attorney General Griggs found Carter innocent on that charge, see Report of Griggs, p. 4.

—46—

PAY ROLLS, ETC.

For evidence as to the pay rolls see (Rec., 3667-69.)

The evidence proving the statements as to Sterly has already been referred to in Request No. 46, and need not be repeated here.

For evidence that Attorney General Griggs found Carter innocent on that charge, see Report of Griggs, p. 4.

—47—

CARTER'S TRANSFER FROM SAVANNAH TO LONDON.

After Captain Carter had been assured in February, 1897, that he might remain at Savannah until the new work at Cumberland Sound had been completed; and although he knew it was within his power so to remain; he nevertheless asked in March, 1897, to be relieved from duty at Savannah, when not a dollar had been paid out on those contracts, and when there was about $3,000,000 worth of work yet to be done by Greene and Gaynor in that District; and he actually succeeded in getting relieved from duty there in July, 1897, when there was still about $2,500,000 worth of work yet to be done by Greene and Gaynor! (Rec., 8311-19.) (Ex. 79; 86.) (An. Rep. C. E. 1897.)

Even after Carter had asked to be relieved from duty at Savannah in March, 1897, and when he was informed he would not be moved until the coming fall (at which time all of the mattress work would have been completed and under water), he nevertheless asked to be relieved at once, and to be sent abroad. (Rec., 8411-17, 8419.)

The letter from Captain Goethals, assistant to the Chief of Engineers, dated Apr. 27, 1897, and informing Carter that the Chief of Engineers proposed to make no changes in Southern stations before the fall, is as follows:

> *"There is to be no change in the South until October at the earliest and word has gone forth to that effect."* (Rec., 8417.)

W. BAYARD CUTTING testifies concerning the arrangement for Carter to remain at Savannah:

> "Having at that time large financial interests in the State of Florida, and believing that the interests of that state would be materially advanced by the rapid and successful prosecution of the work, I was anxious that the work should be in the hands of some one of ability who had had experience in similar undertakings. Captain O. M. Carter, who was United States Government Engineer in charge of the work in the harbor of Savannah, Georgia, and who was also in charge of the work at Cumberland Sound, had given evidence satisfactory to me of his ability to conduct the work to a successful and speedy conclusion. I believed it to be for the best interest of the work and of the United States Government that no change of super-

vision should occur, and that Captain Carter should remain in charge of the Cumberland Sound work until its completion. With this end in view I called upon the Honorable Daniel S. Lamont, then Secretary of War of the United States, and suggested that if not inconsistent with the public service, he request his recently appointed Chief of Engineers, General John M. Wilson, to permit Captain Carter to remain in charge of the harbor work at Cumberland Sound until its completion. Soon after I made my request of Secretary Lamont, he wrote to me on the date of February 28th, 1897, saying, among other things, "I have arranged the Carter matter.'" (Rec., 8798-99.)

H. Reiman Duval testifies concerning the arrangement by which Carter might have remained at Savannah, had he so desired:

"In 1897, and for some time prior to that date, I was president of the Florida Central and Peninsular Railroad which is the only railroad running to Fernandina, Florida. For many years the United States had been attempting to deepen the water over the ocean bar at Cumberland Sound which is the entrance from the ocean to the harbor of Fernandina. * * * I thought it would be detrimental to the progress of the Cumberland Sound work to have a new and probably inexperienced engineer in charge of it, and the confidence I had in Captain Carter, due to his successful work at Savannah and his experience at the Sound, made me desire his retention until that work was completed. * * * Mr. W. Bayard Cutting, a large owner in the Florida Central and Peninsular Railroad, being in Florida with me in February, 1897, and being equally interested with me in the early and successful completion of the work at Cumberland Sound, agreed on my suggestion to make a special request of Mr. Lamont, then Secretary of War, for his influence with General Wilson in behalf of our desire that Carter should be retained in charge at Cumberland Sound. I therefore telegraphed to Washington for an appointment with Mr. Lamont for Mr. Cutting and myself, but upon arriving there, thinking that Mr. Lamont would feel more at liberty to talk to Mr. Cutting whom he knew very well, than he would to me, I did not accompany Mr. Cutting to Mr. Lamont's office, but waited at the Shoreham Hotel for Mr. Cutting, who soon returned, stating that Mr. Lamont was in sympathy with our desires, and would take the matter up with General

Wilson immediately. Mr. Cutting and I returned to New York that afternoon and shortly thereafter Mr. Cutting received a letter from Mr. Lamont stating that he (Lamont) had arranged the Carter matter. * * * Later, Mr. Lamont, with his wife and secretary, came to Savannah where I met them and accompanied them over the harbor works at Savannah, at which time Mr. Lamont referred to Mr. Cutting's request, and stated that he had had no difficulty in getting General Wilson to agree to let Carter finish the work. Shortly after that I met Mr. Lamont in the mutual Life Building in New York, when he told me that he had had a letter from Wilson since his (Wilson's) return from Savannah, in which Wilson stated that he was glad he had made the promise to retain Carter at Savannah, because Carter was the right man in the right place, or words to that effect. Afterwards I narrated the whole matter to Carter, who expressed high appreciation of my interest and its result, but at the same time said that he hoped I would not consider that he was committed to stay in Savannah, on account of what I had done, because it might prevent his getting a more desirable station or promotion; to which I replied that I had not sought his retention on his account, but on my own, and that he was under no obligations to me whatever." (Rec., 8799-8800.)

Mr. Duval further testifies that under the terms of that arrangement with the Secretary of War and the Chief of Engineers, "*Captain Carter might have remained in charge of the harbor work at Fernandina until its completion had he so desired.*" (Rec., 8802.)

There is no evidence to the contrary.

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CARTER'S ALLEGED CONCEALMENT BEFORE THE COURT MARTIAL.

For evidence that Carter testified before the Board of Engineers and the court martial concerning Westcott's gifts to him; his wife's estate; the Orange property; the 8th avenue property; his actions as attorney for Westcott, etc., see (Rec., 5787-91, 5804-06, etc.).

That Abram J. Rose, who was Carter's attorney before the court martial, knew of the gift by Westcott to Carter on October 29, 1897, by preparing the papers for the transfer and

by being present when that transfer took place, see (Rec., 4692-95) and (Rec., 5683, 5709, etc.).

—49—

CARTER'S DIARIES.

The evidence in support of the statements in relation to these diaries has already been referred to in Request No. 49, and need not be repeated here.

It has been seen in Request No. 49, that General Gillespie testifies Gillette did not have access to Carter's diaries in 1897, as Gillette now swears he did.

But an examination of some of the alleged entries Gillette swears were in those diaries in 1897 shows it is a physical impossibility for those entries ever to have been what Gillette now swears they were. For instance:

On August 12, 1896, the actual entry on Carter's diary is as follows:

"From Moncton to Pt. due Chene to Charlottetown. Met Blenkhorn and Miss Newton." (Def. Ex. 10-F.)

Gillette says that when he copied that entry it read as follows:

"Met Blankhorn at Charlottetown." (Ex. 655.)

It is physically impossible that the diary entry could be changed from what Gillette says it was to what it now is, without making erasures so as to change the words around. An inspection of the actual present diary entry shows no such erasures were ever made as to that entry; hence Gillette's testimony that he copied that entry is not true. This same situation exists as to other diary entries, which Gillette says he copied, but it is not necessary to mention them in detail.

After Carter has been under fire on the witness stand for nearly ten years, there are only two places where any serious attack is made upon his statements as a witness.

One of those attacks is that Carter testified before the court-martial in 1898 that certain Morris & Essex bonds belonged to his father-in-law, Robert F. Westcott, in 1893, whereas Carter now claims that in 1893 those same bonds belonged to him (Carter).

The facts are that in 1893 Westcott himself bought those bonds through his own broker, and gave his own personal check towards the payment thereof, and Westcott kept those bonds in his own possession for more than four years thereafter, and often collected the coupons therefrom; but, after these

suits were brought in 1901, and after Carter for the first time had access to Westcott's checks and books of account, he found that Westcott always considered those bonds as having been bought for Carter with the estate of Carter's wife, hence Carter now claims these bonds as his.

The next attack is that Carter has changed his diary from what it was in 1893.

The diary now says that Carter received $7,500 in bills from Westcott on March 14, 1893, and used $500 thereof and "deposited balance."

When asked by a hostile officer, who was trying to trap him on the witness stand, four years after the deposit was made, "How was that amount deposited?", Carter answered, "I imagine that it was cash; it don't state here in this memorandum book."

The facts are that the bills might have been used to buy a draft, so as to send the draft to the bank by letter, and the officer who was examining Carter expressly stated to Carter "The deposit was made by letter." No one was likely to send $7,000 in currency in a letter, hence if the statement of the officer to Carter was true, that "the deposit was made by letter," Carter's answer was not in conflict with the diary entry.

The other claim of a change in Carter's diary of April 14, 1893, is based on a difference between the diary as it now stands and an alleged quotation therefrom made by Carter on the witness stand before the Board of Engineers. Carter then said: "In town this morning; arranged about some of Mr. Westcott's affairs and went up to dinner in the evening."

The diary reads "Down town. Arranged with R. F. W. about bonds and went up to dinner evening."; then follows a memorandum about a lady, etc.

That Carter did not attempt to quote the diary literally is clearly evident by a mere comparison. Besides, if we take the word "town," which is the second word both in the alleged quotation and in the diary entry, and then skip to the words "dinner," "evening," there is a difference between the alleged quotation and the diary; hence, if the diary has been changed since Carter quoted it, that change will appear by erasures on the diary.

If there are no such erasures, it proves conclusively that Carter did not attempt to quote the diary literally, but merely to give the substance of that part of the entry relating to the question put to him.

There are no erasures.

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CARTER'S PENCIL MEMORANDA.

The evidence in support of the statements in relation to the pencil memoranda on some of Carter's papers has already been referred to in Request No. 50, and need not be repeated here.

That Carter was in the habit of making memoranda on the backs of envelopes, etc., see (Rec., 5474.)

For evidence that no changes have been made in those entries, see (Rec., 5367, 5371, 5486, 5751, etc.).

See also statement of Horace G. Stone (Rec., 6613).

CHARLES MCPHERSON testifies concerning the memoranda in Carter's diaries, in the letters, etc., as follows:

"Q. Have you examined those diaries and those statements upon which Exhibits 96-A, B, C, D, F and G are based sufficiently to determine whether or not the diaries and those memoranda were made at the time they purport to be made or manufactured years afterwards?

* * * * * *

A. I would not attempt to say from the external appearance of any of the memoranda which I have seen, when they were made. They have to me all the appearance of having been made long ago, but I am not an expert on those questions. On the basis of those memoranda, however, we find that R. F. Westcott occasionally drew checks payable to O. M. Carter, or else payable to himself, and were by him endorsed and deposited in bank to Carter's credit, for odd amounts, and it shows that items of that nature were at that time before R. F. Westcott in making his account. Now, as an accountant, I would say that those items are genuine, from the reason that they are the basis of a check drawn and deposited in settlement of the account; but I do not attempt to testify as an expert, from the external appearance of the instrument.

Mr. Erwin: May not the checks have been the basis of the momeronda, as well as the memoranda being the basis of the checks?

The Witness: No, *that is not possible*, because we had the memoranda and we had the check before we were able to discover exactly the basis of the check, and it was only by discovering one memorandum after another and plac-

ing them together, that we discovered exactly upon what basis the accounting was made." (Rec., 6616-18.)

The Witness: "The original memoranda or copies of them were furnished me a long time before the use of them was discovered, and that is my understanding, that neither Mr. Stone nor Mr. Carter were able to arrive at some of the balances which I subsequently obtained." (Rec., 6619.)

The Witness: "I determined in what manner Westcott reached that balance"—referring to the balance of $489.86 of May 2, 1893,—"and I will say that no one of those diary entries was created to reach that balance, *because they were in existence before the purpose for which they were used was known.*" (Rec., 6642.)

"Q. Now, did it make any material difference where you got the information which enabled you to classify these items, whether you got it from a diary, or whether you got it from one source or another if when you obtained and tested the information you found it was correct?

A. No, it made no difference in the final conclusion. For instance, assuming that there was no memorandum of a nexchange of bonds between Captain Carter and Robert F. Wostcott, but that Captain Carter had told me that such a trade was made, I would insert that exchange in the account and test it by the check which Westcott gave to balance the account, and if by that method I found that that check was the true balance, I would conclude that the exchange was made as I had been advised." (Rec., 6725-26.)

"Q. In the arrangement of the items, if you got a suggestion from a stranger, that does not affect in the slightest degree the items themselves, does it, it merely affects their classification, whether you put them on the debit or the credit side?

A. It does not affect the items.

Q. If, therefore, you find an item and Captain Carter says or suggests that some of these bonds are reckoned at cost and some at selling price, you try and find that this is the true explanation of the account, did you not?

A. Yes, sir.

Q. And if you found, for instance, in the possession of the Government a pencil memorandum on the back of a poem which shows beyond a question where part of the

money came from and what was done with it, and so forth, you use that, do you not, and see whether that is correct?

A. I do.

Q. And you kept on doing that till with what information you could obtain you are able to produce your amount, you are able to classify these entries of debits and credits so that this check of Westcott's for this amount shall be the true balance between them?

A. Yes, sir.

Q. Now, having done that, you base your final conclusion *not* upon Carter's diaries, nor upon any pencil memorandum, or anything of that kind, *but upon tests which you have made, do you not, of the correctness of those items?*

A. *That is true.*

Q. And if those memoranda were incorrect, why, then of course you would know it in the final difference, would you not?

A. I would." (Rec., 6727-28.)

"Q. (Mr. Stone.) In connection with the matters that are undisputed in this case, and in connection with complainant's exhibits, and so forth, have you tested the accuracy of Captain Carter's diaries, these memoranda which are referred to in Captain Carter's diaries and the defendants' exhibits, as having been made by Captain Carter?

A. I have.

Q. *Have you tested the accuracy of them in every instance where there is any reference to any letter, or exhibit, and complainant's exhibits?*

A. *I have.*

Q. *Have you found them to be absolutely in conformity with them?*

A. *I have so found them.*

Q. *Have you the slightest reasons to suspect they are other than Captain Carter's statement of what they purport to be?*

A. *I have not; on the other hand, I have every reason to believe that they are a correct statement.*" (Rec., 6739-40.)

—51—

Carter's Alleged Trials.

Captain Carter appeared before two tribunals, the Board of Engineers and the court martial.

The conduct of the Board of Engineers has already been given in some detail in Defendant's Request for Findings, No. 51 (to which reference is here made), and only one additional matter need be noted here.

On October 25, 1897, the Board of Engineers met in secret (and without the knowledge of Carter) and took the testimony of Mr. Josiah H. Reed, and when that testimony was found to be favorable to Captain Carter, the Board of Engineers suppressed it. (Rec., 6464.) See also Defendant's Requests for Findings, page 150.

On October 26, 1897, after Gen. W. P. Craighall had been examined in Carter's presence, the Board of Engineers held another secret session (of which Carter had no knowledge) and brought before it Mr. Robert Maclay, the President of the Knickerbocker Trust Company, and began to question him concerning B. D. Greene's account in that bank (Rec., 913), saying to him that certain money in Greene's account had been "drawn improperly" from the United States. (Rec., 914.)

Mr. Maclay declined to produce his books and papers, or to answer questions, unless he could do so "under due process of law" (Rec., 915-16), whereupon the following colloquy took place:

> "Major Adams: It is a military court, and we cannot oppress the citizens. We summon the army officers, and *they* come without any trouble.
>
> Colonel Gillespie: *They come in like heroes.*" (Rec., 917.)

What kind of heroes some of them really were will readily be seen by examining the matters relating to Col. T. F. Barr (Wit. 5-9); Col. P. C. Hains (Wit. 24-27); Capt. C. E. Gillette (Wit. 20-24); (Req., 7, 17, 18, 19 and 43), etc.

For evidence that Carter was tried by a court martial composed of thirteen members, see (Rec., 1055-57).

For evidence that the decision of the majority was binding on the minority, and that each member took an oath never to divulge how the vote stood, see (Rec., 8392). (85 Art. War.)

For evidence that only 2 out of the 13 members of the court martial were Engineers: and that only 6 out of the 13 were graduates of West Point, see (Rec., 8389-92). (See also official Army Register for 1898.)

For evidence that a court martial had no power to compel the testimony of civilian witnesses, or the production of their books and papers, see (Rec., 5857). (C. M. 4849.)

When a civilian witness refused to answer a question put to him before the court martial, the ruling of that tribunal was as follows:

> "The Court: (Addressing the witness) The court will instruct you to the effect that, in case you do not answer the question, the court has no power to punish you." (Rec., 2023.)

The prosecuting judge advocate (who was by law the legal adviser of the court martial) then made an address, in which he admitted the lack of power of a military court to require a civilian witness to answer questions, but hinted at a trial in another forum, saying of the court martial:

> "Its mandates may be disregarded by a witness, * * * and this court, and *all courts martial are powerless.* Public notice of this kind having been given, I deem it my duty to make this statement, that it may also be made public: that *there are other tribunals beyond this;* that the civil courts of the United States, that the Congress of the United States, *can call witnesses who refuse to testify here, and compel them to testify;* and give out the knowledge they possess touching the charges that are before this court." (Rec., 2028.)

When a civilian witness refused to produce books and papers before the court martial, the ruling was as follows:

> "The court is powerless to punish you for not doing so." (Rec., 2373.)

In this connection, the prosecuting judge advocate (who was by law the legal adviser) stated to the court martial as follows:

> "I don't know, may it please the court, that it is necessary to make further illustration of our impotency. There is here a court, appointed by the President of the United States, under its Constitution and laws, a court having the power to adjudge the death penalty, and to send this accused officer, should he be found guilty, to the penitentiary for a term of years; and yet, when it seeks information to enable it to pass upon the conduct of their comrade, the doors are closed." (Rec., 2391.)

Referring to the money paid to Greene and Gaynor under their contracts, the Judge Advocate said:

> "Could we but have had an inspection of the books

and accounts in the Trust Companies and Banks of New York with which the combination did business, we could have followed that money, * * * and learned just what became of it. That knowledge is denied us." (C. M. 4849.)

For evidence that Carter sought, through writs of *habeas corpus*, etc., to get the verdict of the court martial set aside, and to get a trial in a court of justice, see (Rec., 6438-39).

The character and the methods of procedure of the Board of Engineers and the court martial have been considered in Defendant's Request for Findings No. 51.

For the evidence in support of the statements made in that request, see (Rec., 5856; 8308-8407).

For the evidence that information was before the reviewing officer which was never before the court martial, see (Rec., 8406-07).

E. I. Johnson admitted that even matters which took place *subsequent* to the time of court martial were placed before the reviewing authority:

"Q. I will ask you, Mr. Johnson, if these two last papers purporting to be the account of O. M. Carter with the Union Trust Company in 1897, *1898 and 1899*, were seen by you, or used by you, before Mr. Griggs while he had the matter under consideration, or if any information contained therein was used?

* * * * * *

A. *These papers were given to me by Mr. Griggs, and I made him acquainted with the data thereon contained.*

Q. *Prior to the time of his rendering his decision?*

A. *Yes.*" (Rec., 6368-69.)

That the court martial convened on January 12, 1898, and finally adjourned on April 28, 1898, see (Rec., 1055).

For evidence that Barr, Gillette and McClure took the witness stand, after Carter had recited the incidents about Otis, and did not deny them, see (Rec., 8856; 8888; 8893).

For the evidence that Carter made every effort to obtain a trial in a court of justice, see (Rec., 6438-44.)

For evidence that the Government waited until after Westcott was dead before permitting Carter to have a trial in a court of justice, see (Rec., 5727.) (See also Rec., 6438; 6440.)

The letters of Carter and of his attorney, begging that Carter be given a trial in a court of justice, are as follows:

"FORT LEAVENWORTH, KANSAS.
June 17, 1901.

THE PRESIDENT:

Since my appointment to the United States Military Academy in 1876 I have striven loyally to serve my country with all of the intelligence and energy of which I was possessed. Nearly four years ago, from motives not necessary to mention here, an assault was made upon my honor, resulting in my trial by court martial for an alleged civil offense, and my subsequent degradation and imprisonment. Conscious of my entire innocence and of the fact that hence I was not and could not have been proven guilty at my trial, I begged for an impartial review of the evidence taken before the court martial. That review was made by ex-Senator George F. Edmunds, who stated that even admitting the illegal evidence adduced there, I was not proven guilty of the only offense of which I now stand condemned. He, however, reported against me on some minor points which affected my honor. I therefore begged for a trial before any tribunal where I might have the legal power to compel the production of evidence, which power I did not possess in the trial by court martial; that request was denied for reasons not made public, and the case was referred to a second judge, this time the Attorney General of the United States. Nearly a year elapsed before he acted upon the case, during which time my many requests for a decesion were denied. At last, on September 29, 1899, he reported to your Excellency that the evidence taken before my court martial showed me innocent of the offenses which Judge Edmunds recommended me to be declared guilty, but he recommended me to be considered guilty of the charges of which Judge Edmunds had declared me innocent, because as he stated, he considered the uncontradicted evidence of my innocence taken at my trial improbable. He then gave some reasons for his belief in my guilt, none of which was based upon any evidence taken at my trial or in my presence.

I have always felt that if it were shown to Your Excellency, as it can be if opportunity is given, that *the reasons assigned for my condemnation are not based upon any proceedings wherein I had an opportunity to be heard, and are moreover as a matter of fact false,* this judicial error would not be permitted to stand uncor-

rected. For nearly two years the prosecution has been asserting my guilt through the medium of the public press, but my efforts to test the truth of those unproven assertions in a court of justice have been strenuously resisted. I have sought by every legal means in my power to compel a trial where I might confront the witnesses on whose evidence, taken in secret and in my absence, I have been condemned; but every avenue leading to a determination of the truth has been closed to me. I therefore address Your Excellency, not to ask any favor, but to beg for simple justice; to beg for an opportunity which I have never had, and which Your Excellency can grant,—that of determining in a court of justice where there is power to compel the testimony both of soldiers and of civilians and whose decisions none may question, whether the unproven assertions of my guilt upon which I have been condemned are true or false. If true, such truth ought to be determined as easily in my presence and in the light of day, as in my absence and in secret. If false, as it can be shown they are, I feel sure Your Excellency will not want this awful judicial error to rest uncorrected. I beg for this opportunity for justice, not to escape any punishment however unmerited, but because I am innocent, and because it is my birthright to be accorded an open trial where I may confront the witnesses against me.

I am, Sir,

Your Obedient Servant,

(Rec., 6588.) O. M. CARTER."

"Washington, D. C., July 10th, 1901.

To the Attorney General:

Captain Oberlin M. Carter was tried before a court martial for alleged offenses; was convicted; fined $5,000; sentenced to be imprisoned for 5 years at hard labor; to be dismissed from the service of the United States, &c. The details in regard to this matter are well known in your department, and it is not necessary to repeat them here.

A court martial, by reason of its inability to compel the attendance of civilian witnesses and the production of papers, is without the power in many cases to do complete justice; and especially was this so in this case, because there were involved in the trial matters which could not be determined without the evidence of civilian witnesses whose presence and the use of papers under their

control could not be procured. Captain Carter has always asserted and still asserts his entire innocence of the offenses which were charged against him, and that upon a fair trial of those charges before a tribunal, civil or criminal, with power to enforce the attendance of witnesses and the production of books and papers his innocence would be made manifest.

There are two ways open to the Government and not to him available, by which such a trial can be had: 1st. He has been indicted in the United States Court in Georgia, charged with the same alleged offenses for which he was tried by the court martial above alluded to. A trial on that indictment would enable him to procure his testimony, and would result in a thorough investigation before a tribunal having ample power to ascertain the truth, and thereby judicially determine whether or not he is guilty of those charges or any of them. 2nd. The Solicitor General in his brief in the Supreme Court of the United States took occasion to enter into some details in respect of what had transpired in a proceeding with which Captain Carter had nothing whatever to do, to which he was not a party, and in which he had not had an opportunity to make any statement in his own behalf or to confront anyone who was examined in connection with that proceeding; and it was in that brief stated in substance that Captain Carter had defrauded the Government of $722,522.02.

Three months have elapsed since that statement was made in the Supreme Court and no action has yet been taken. Now, if the Government has such knowledge as justified such an assertion, then I submit that it ought to bring a suit against Captain Carter for this amount of money and bring it promptly, to the end that the case may be tried and the truth of this assertion ascertained while witnesses are living, and not defer it until the witnesses are dead.

If the Government was defrauded of more than $2,000,000, and Captain Carter got over $700,000 of it, he owes that money to the Government, and steps should be taken to recover it.

If he does not owe it, that fact in common justice under the circumstances above alluded to ought to be judicially declared.

So, these two modes of getting at the truth of this mat-

ter are open to the Government: (a) try him on the indictment, and (b) sue him for the money.

If it be said that the attendance for trial of the parties who were joined with him in the indictment cannot be had, the answer is that Captain Carter had nothing whatever to do with that. He can be tried separately, and insists that he should be brought to trial whether the other defendants are tried or not; or, that civil proceedings shall be instituted against him, and that the matter shall be brought to as speedy a trial as the ends of justice will permit. I bring this matter thus to your attention for the purpose of asking that the Department of Justice will in one way or the other take such action as will enable Captain Carter to have a trial before a tribunal possessing full powers.

Respectfully,

JERE M. WILSON.
Atty. of O. M. Carter."

(Rec., 6594.)

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IF THERE WAS ANY DEAL BETWEEN WESTCOTT AND GREENE AND GAYNOR, CARTER WAS KEPT IN IGNORANCE OF IT.

That nothing has ever been found by the Government employes to show that Westcott had any deal with Greene and Gaynor, see (Rec., 7746-69).

CHARLES MCPHERSON, after carefully examining all of the evidence in this case relating to the money matters, testifies specifically as follows:

"Q. *Do you find any evidence of any kind, shape or description any paper in there, any book account, anything to show in the slightest degree that Westcott or Carter received any money from Greene and Gaynor?*

A. *There is no such evidence.*" (Rec., 7173.)

For the evidence that, if Westcott had any deal with Greene and Gaynor, he concealed it from his confidential attorney, his brokers and intimate friend, his partner, and his own son, see the testimony of those men under Reference herein No. 25.

For the evidence that, if the moneys Westcott received came from Greene and Gaynor, he carefully concealed it by taking Carter with him to the offices of the Vanderbilts where he re-

ceived the moneys in question, see (Rec., 5512; 5593, etc.). (Def. Ex. 10-A, 10-B, etc.).

For the evidence of Westcott's intimacy with the Vanderbilts, his wealth, etc., see (Rec., 5347-48) (Rec., 2406). See also Request herein No. 25.

(1) The suspicion that Westcott's partnership with Greene & Gaynor was on Carter's behalf is contrary to the presumption of law that every man is innocent, *i. e.*, the presumption that Westcott was an honest partner with Greene & Gaynor on his own behalf, and not a criminal partner on Carter's behalf.

(2) In October, 1897, Westcott gave to Carter in Elihu Root's law office most of the bonds in court. Whether those bonds were Westcott's bonds, or whether Westcott was acting for Carter, is conclusively settled by the folowing, which took place eight days before Westcott gave the bonds to Carter: 55 of the bonds in court were purchased in 1895 through the bond brokers, Reed & Flagg. (Rec., 7821-7834.) Carter applied to Reed & Flagg for a copy of the account on their books which showed when those bonds were bought, how much they cost and how they were paid for. Carter desired to get that account for the Board of Engineers before whom he was then on trial. Reed & Flagg then consulted with Westcott, because the account was Westcott's, and they asked Westcott's permission to give Carter a copy of the account. But Westcott refused to let Reed & Flagg give Carter a copy of that account, on the ground that the transactions in that account,—*i. e.*, the purchase of the 55 bonds and the payment therefor,—were not Carter's transactions, but were his own (Westcott's) private transactions into which the Board of Engineers had no right to inquire, and thereupon Reed & Flagg in writing refused Carter's request for a copy of that account, and their original written refusal is in evidence in this case. (Rec., 6574.)

(3) The fact that Westcott was a partner with Greene & Gaynor on his own behalf is also proved by Westcott's own actions, proved by his own checks and deposit slips in his own handwriting, where in November, 1893, and again in December, 1893, and again in January, 1894, and again in May, 1894, and again in November, 1894, and again in December, 1894, and again in January, 1895, Westcott collected the coupons from certain bonds belonging to the estate of Mrs. Carter, and sent the money to Carter; and at each of the very same times Westcott collected the coupons from the bonds which Westcott had bought with his profits from Greene & Gaynor, and instead

of sending any of that money to Carter, Westcott deposited it to his own credit and used the money for his own private purposes. (Rec., 7324, etc.; Ref., 326, etc.)

(4) Any suspicion that Westcott was a partner with Greene & Gaynor on Carter's behalf is contradicted by the following: If, during those four years, Westcott was a partner with Greene & Gaynor on Carter's behalf, then, according to complainant's claims, the money received and handled by Westcott was money stolen from the United States; but the evidence is clear and uncontradicted that at the time the bonds were transferred by Westcott to Carter they were not treated as stolen bonds, either by Westcott or by Carter, or by Stimson, Westcott's attorney, or by Rose, Carter's attorney; nor were they subsequently treated as stolen bonds by Westcott's own son.

(5) Any suspicion that Westcott was a partner with Greene & Gaynor on Carter's behalf is also contradicted by the following: If the bonds were stolen bonds, which Westcott had been hiding, he would have turned them over to Carter in some secret place without letting outsiders know about it, instead of transferring them to Carter as he did in Elihu Root's law office, in the presence of two prominent lawyers of New York, and doing so with written documents regarding which the attorneys had corresponded beforehand.

(6) Any suspicion that Westcott was a partner with Greene & Gaynor on Carter's behalf is also contradicted by the following: If the bonds were stolen bonds, Westcott knew it and Carter knew it, and as Carter was on public trial at that very time, charged with having more money that his army income, and charged with having received that money from Greene & Gaynor, then Westcott's attorney Stimson, and Carter's attorney, Rose, must also have known it, or at least have had plenty of reasons to suspect it. Reputable lawyers like Stimson and Rose do not participate in transfers of $222,000 of bonds to men who are on trial for having more money than their income unless they are sure said bonds were not stolen; and there is no escape from the conclusion that Stimson and Rose had evidence that the bonds were Westcott's bonds which were being honestly transferred to Carter, else they would not have assisted in the transfer.

(7) Any suspicion that Westcott was a partner with Greene & Gaynor on Carter's behalf is also contradicted by one of the most important and solemn acts that Westcott could perform. Westcott left for Europe on January 29, 1895, and remained there for more than a year. Before going, he gave to

Carter a power of attorney which is in evidence, in which he had Mrs. Westcott join, which power of attorney was so broad and ample that if Carter was a dishonest man he could have made away with practically all they had in the world during the year or more they were absent in Europe. (Rec., 11273, etc.) The giving of such a power of attorney as that by Mr. and Mrs. Westcott to Carter, and their going to Europe and staying there 15 months, leaving Carter with that power of attorney in charge of their property, is conclusive evidence that in January, 1895, Robert F. Westcott did not consider Carter a dishonest man, which Westcott must have considered him if the large amounts of money received by Westcott in the two years preceding, *i. e.*, in 1893 and 1894, from Greene & Gaynor, had been received by Westcott on Carter's behalf.

(8) Any suspicion that Westcott was a partner with Greene & Gaynor on Carter's behalf is also contradicted by the following: Westcott's intimate friend and broker, J. H. Reed, testifies that just before Westcott went to Europe in January, 1895, leaving Carter with full power of attorney in charge of his affairs, Westcott told him that he had "unbounded confidence" in Carter's "integrity" (Rec., 888, etc.); and Westcott's broker, W. H. Flagg, testifies that Westcott told him at the same time that he had "implicit confidence" in Carter (Rec., 2380). Westcott could not have had any such confidence in Carter if the large amounts of money received by Westcott in 1893 and 1894 was money stolen by Carter from the United States.

(9) Any suspicion or presumption that Westcott was a partner with Greene & Gaynor on Carter's behalf is also contradicted by the testimony of Carter, who testifies that he never at any time received a dollar from Greene & Gaynor, either directly or indirectly (Rec., 5859) and that he never suspected Westcott had ever received any money from them; and by the testimony of Greene & Gaynor, who both testify that they never at any time paid a dollar to Carter, or to anyone for him, or for his benefit. (Rec., 881; 938; 3571.)

(10) Any suspicion that Westcott was a partner with Greene & Gaynor on Carter's behalf is also contradicted by the following: In May, 1897, Greene & Gaynor had contracts amounting to more than $3,000,000 for governmental work over which Carter had charge as supervising engineer, and on which contracts not a dollar had yet been paid to them. (Rec., 8311.) Two witnesses in this case, Mr. H. R. Duval and Mr. W. Bayard Cutting, President and principal owner of

the only railroad that ran to Cumberland Sound in 1897, testify that they had confidence in Carter's ability, and requested the Secretary of War to let Carter remain where he was until the work at Cumberland Sound could be completed, and that the Secretary of War wrote them he had made such arrangements with the Chief of Engineers. Duval further testifies that he told Carter of that arrangement. (Rec., 8802.) Nevertheless the record shows that Carter voluntarily asked to be relieved from these works, and that he accepted the position of military attache to the Court of St. James on May 24, 1897, before he ever paid a dollar on those contracts to Greene & Gaynor, and that he left Savannah on July 17, 1897, to take up his duties in London, and turned over the supervision of those contracts to Captain C. E. Gillette, whom he had never seen before that time. (Rec., 8311-19; Rec., 379.) If Carter had had any interest whatever in those $3,000,000 contracts of Greene & Gaynor, or if Westcott was a partner with them on his behalf, it is inconceivable that Carter would have sought and secured a transfer from Savannah, when he could have remained there to supervise the work of Greene & Gaynor and to pay them for it, had he so desired.

(11) Any suspicion that Westcott was a partner with Greene & Gaynor on Carter's behalf is still further contradicted, and in a still more powerful manner, *i. e.*, by the great law of self-preservation, which brings up the question whether when Carter was on trial in New York charged with receiving moneys from Greene & Gaynor, he would knowingly and in the presence of witnesses have received money or bonds in a prominent law office of New York if he had known or even suspected that the money or bonds had ever come from Greene & Gaynor, and it brings up the still greater question whether Carter would have given a written receipt for those bonds, as he did, in a public place and before witnesses, when he was on trial for receiving money from Greene & Gaynor, if he had known or even suspected that those bonds had been bought with money which came from Greene & Gaynor. The facts in that regard are as follows: When Carter was on trial in 1897, charged with receiving money from Greene & Gaynor, he received from Westcott the bonds which are now in court, and gave to Westcott written receipts therefor, which described those bonds in detail so that they could readily be traced. Carter signed and delivered one of those receipts in one of the most prominent law offices of the City

of New York, in the presence of Westcott and of Westcott's attorney, on October 11, 1897. (Rec., 5670.) Carter signed and delivered the other receipt eighteen days later, *i. e.*, on October 29, 1897, in another of the most prominent law offices of the City of New York, in the presence of a different attorney for Westcott, and in the presence of Westcott himself and of Carter's attorney. (Rec., 5722.) All this time Carter was on trial for receiving money from Greene & Gaynor, and the newspapers were full of it, and the stenographers who wrote out those receipts in those law offices knew all about it. If Carter had supposed, or had even suspected, that the bonds he thus received were purchased with the very money he was charged with stealing, *i. e.*, money which came from Greene & Gaynor, he would not have received that money or those bonds while his trial was going on, and have publicly receipted for the same, in writing, in the presence of numerous witnesses in two of the most prominent law offices of the City of New York. If Carter had even imagined that any of that money came from Greene & Gaynor, it is not within the range of probabilities that he would have signed his own death warrant, and would have put himself in the power of so many other persons, most of whom were strangers to him by thus publicly receiving and receipting for, in writing, the very money he was then on trial for stealing. Men who are on trial for stealing property do not go into strange law offices during that trial, and in the presence of numerous witnesses knowingly receive that property and sign and publicly deliver written receipts for it. If Carter had been swindling the government for six years without detection, he would not be imbecile enough, while he was on trial for stealing, knowingly to receive and give written receipts for the stolen money, and do it in public places and in the presence of numerous witnesses. If Carter was a rascal, he was such a shrewd rascal that seven years of unprecedented investigation have never discovered the scratch of a pen indicating that he was in any deal with Greene & Gaynor, and to suppose that such a rascal, after six years of such skillful concealment, would walk into Elihu Root's law office in New York, while he was on trial for stealing the money, and knowingly sign and deliver written receipts for the alleged stolen money, in the presence of numerous witnesses, is simply preposterous and beyond belief. Carter was not in need of the money or bonds he received in Root's office. He already had $63,000 which he had received a few days

before for the Orange property from Westcott. He had no family. He had two high positions, *i. e.*, military attache at London, and a life position in the army. He certainly did not need money so much as to run the frightful risk of signing his name to that receipt in Root's office, merely to get possession of those securities. Besides, the testimony of Westcott's attorney, Stimson, negatives that suspicion, for Stimson says that Carter twice offered, after he had received the securities, to return part or all of them to Westcott. No one can possibly imagine that Carter would have received that money from Westcott in such a public way, and in such public places, and would have given written receipts for it in the presence of numerous witnesses, if he had had the slightest suspicion it was the very money he was then on trial for receiving from Greene & Gaynor.

There is only one explanation for what Carter did, and that is: He never even suspected that any of the money Westcott thus gave to him had ever come from Greene or Gaynor.

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ROBERT F. WESTCOTT.

For the evidence that Westcott induced Carter to take the securities on October 29, 1897, and then fled to Europe, see Reference herein No. 25, and Defendants' Exhibit No. 100.

That Westcott committed perjury, if he testified against Greene and Gaynor, as the complainant says he did, see Request No. 37.

If Westcott was a "fence" for Carter (as is now asserted by the complainant), he ought to have been prosecuted; but he was *not* prosecuted!

That Westcott was over 70 years of age and in feeble health, see the testimony of his own son, under Reference herein No. 25.

When Westcott was asked to testify for Carter before the Board of Engineers, he at first consented to do so, and actually went to see the Secretary of War about the matter, but the Secretary was sick and could not see him. (Rec., 6089.)

After the Board of Engineers had met at Savannah, and had begun to pry into Westcott's affairs, Westcott

> "became very indignant and refused to go there, because he said it would disclose his transactions with the Vanderbilts, with whom (from the days of the old Commodore) he had been in the most intimate relations, and had handled

millions and millions of dollars for them, and if this Board was going to pry into his private affairs, he would not go before it." (Rec., 6089.)

In fact, Westcott stated that he had been concerned in transactions with the Vanderbilts, which he would not disclose, even to save Carter, since such disclosures might injure Westcott himself. Westcott stated to Carter as follows:

"If your Mama (Mrs. Westcott) and you and myself were on a sinking ship, and there was only one life preserver, I would have to have it myself." (Rec., 8789.)

Westcott was a millionaire of New York City. He founded the Westcott Express Company, the United States Express Company, the Union News Company, the Produce Dispatch, and he either founded, or was prominently connected with, many other corporations doing business with railways entering New York City. (Rec., 5348.)

Westcott was the father-in-law of Captain Carter, and is the man to whom Carter receipted for the funds which are now in court.

That Westcott was a man of large wealth is shown by the following testimony.

SENATOR C. M. DEPEW, then president of the New York Central Railroad, testifies:

"A. Mr. Westcott is the originator or founder of the Westcott Express Company. * * * He retired from business some years ago. * * * (Rec., 2406.)

The Witness. I understood when he retired, that he retired a rich man. I have understood from him since, in conversations that I have had with him about his affairs, that he is a man of wealth." (Rec., 2406.)

R. E. WESTCOTT, the only son of R. F. Westcott, testifies:

"Q. Your father is a wealthy man, is he not?

A. Yes, sir." (Rec., 3291.)

E. LUTHER HAMILTON, the confidential attorney of Westcott, testifies that Westcott had given to his son

"large sums of money, and had given to him the business of the Westcott Express Company, out of which he has made a fortune." (Rec., 4687.)

The record shows otherwise that this "fortune" is one of millions of dollars.

HAMILTON also testifies that Westcott had given to his wife "several hundred thousand dollars." (Rec., 4686.)

After Westcott had given to Carter what he did on October

29, 1897, and after having given to one of his daughters "seventy thousand dollars," the record shows (through Hamilton's testimony) that Westcott left at least half a million dollars to be divided between his two daughters. (Rec., 4686-87.) (Ref., 317-20.)

Oberlin M. Carter testifies:

"A. I believed him (Westcott) to be worth several millions of dollars; I did not know how much." (Rec., 5348.)

Westcott was accidentally killed by a fall from his carriage on July 19, 1901, and these suits were brought first on July 30, 1901. (Rec., 5729.)

Westcott is not a witness in this case, and Westcott never was a witness in proceedings of any kind which related to Carter, or where Carter was represented, or had any opportunity to be present. In fact, the complainant's solicitor states to this court that Westcott went to Europe in 1897 because he "did not desire to testify against the husband of his dead child." (Rec., 35.)

Complainant's solicitor further states that although Westcott would not testify against Carter, he "expressed his willingness" (after Carter had been thrown into prison) "to testify as against the *other* conspirators," and that Westcott did testify against Greene and Gaynor in a proceeding to which Carter was not a party, and where he was not permitted to be present. (Rec., 37.)

Notwithstanding this, the complainant's solicitor quotes from outside of the record the alleged testimony of Westcott, and the indulgence of the court is asked that, also outside of the record, that alleged testimony and the circumstances under which it was taken may be considered.

Westcott was a shrewd and successful business man of New York, who, to us his own language, "never missed a trick." (Rec., 11520.)

The record shows that he transacted much of the private business of the Vanderbilts, and that his intimacy with Mr. Vanderbilt was such that he called Vanderbilt "Corneel," and Vanderbilt called him "Bob." (Rec., 5349.)

Westcott was in the habit of carrying about in his pocket large sums of money,—as much as "$14,500." (Rec., 11542.)

Westcott had quarreled with his only son, and told Carter (after Carter's wife died) that if he would not remarry, but would remain with him as a son, he would give to Carter a large allowance and the share of his estate which Carter's

wife would have inherited, had she lived. (Rec., 5356; 6278.)

Westcott had every confidence in Carter, and in 1895, he gave to Carter a full power of attorney to transact all of his business, etc., during his (Westcott's) absence in Europe. (Rec., 11519.)

The record shows that Westcott was most liberal to Carter, and that their affectionate relations continued up to the time Carter returned from Europe in the fall of 1897.

When Carter was arrested in September 11, 1897, on the charge of having spent more money than his army pay, Westcott went to Washington to see the secretary of war, and to tell him that it was he who had given to Carter the moneys he had expended (Wy. 1250); but the secretary was sick and could not see him, whereupon he and Carter went to New York. When the board of engineers began to pry into Westcott's private affairs, he (Westcott) became angry and declined to go before the board, on the ground that it would expose his transactions with the Vanderbilts, whose confidential agent he had been. (Rec., 6089.)

Before going away to Europe Westcott gave to Carter the share of his (Westcott's) estate which Carter's wife would have inherited, had she lived, and those moneys are now in court. (Rec., 6278.)

Westcott made this gift to Carter on October 29, 1897, he did not have his confidential attorney, E. Luther Hamilton, prepare the papers, but employed a stranger, H. L. Stimson, the law partner of Elihu Root. (Rec., 11526.)

Stimson was an intimate friend of Solley, Westcott's son-in-law, and as Solley disliked Carter, Westcott advised Carter to hire another lawyer, so that papers might be prepared which would vest his gift in Carter in such a way that the Solleys could not take it away in the event of his death. (Rec., 306.)

Hamilton testifies that Westcott consulted with him concerning the investment of the moneys the Government now alleges belong to Carter, and that Westcott proposed to invest that money for himself, and to put it in real estate in his (Westcott's) wife's name. (Rec., 386.)

Westcott testified for the Government in 1900, and the character of the arrangement under which he testified is shown by his testimony.

Westcott testifies:

> "A. *I am perfectly willing to state anything, if you don't make me responsible for what I say.*"

"Mr. Erwin: *I desire to be heard. Stop, Mr. Witness.*" (Rec., 11717.)

The following are samples of Westcott's false statements:

Westcott testifies:

"A. Why, Hamilton never was my attorney." (Rec., 11768.)

But Hamilton testifies he had known Westcott for "35 years and over," saying that "from about 1891 to the time of his death":

"A. I was his legal adviser for a great part of that period. I was on friendly, social, intimate terms with him and his family." (Rec., 4683.)

Westcott testifies:

"Q. Didn't you call upon Mr. Tailer upon your return from Europe late in the spring of 1896?

A. I may have done so; I don't recollect it." (Rec., 11738.)

"Q. And didn't you tell him that you had given in your absence Captain Carter, a power of attorney?

A. I might have done so.

Q. And didn't you tell him that he had bought for your account some coal stocks?

A. No, sir." (Rec., 11739.)

But Tailer testifies:

"Mr. Westcott * * * said that he had given, in his absence, Captain Carter a power of attorney, and he had bought for his account some coal stocks. * * * Mr. Westcott told me that the stocks were bought by Captain Carter under his power of attorney, * * * and that he had given Captain Carter the order to buy them, and therefore it must have been with Mr. Westcott's money." (C. M. Ex. 438.)

Westcott testifies:

"Q. Didn't you call upon Reed & Flagg and state to Mr. Flagg, soon after your return from Europe in 1896, that you disapproved of the purchase of the stock, and that you wanted bonds purchased?

A. No, sir." (Rec., 11721.)

But Flagg testifies:

"Q. What did Mr. Westcott say to you about this purchase, in your interview, if he said anything?

A. He called my attention to the fact that Captain

Carter had bought the stock, and said he didn't approve of it, because he wanted bonds bought; he said we ought not to have advised Captain Carter to buy such stock * * *.

Q. Mr. Westcott, then, did not approve of the purchase; that is to say he condemned the purchase?

A. He disapproved of it.

Q. He, nevertheless, ratified the purchase?

A. Oh, yes, sir." (Rec., 2385.)

Reed & Flagg, state that the stocks were bought for Westcott, and were put in Carter's name temporarily, solely "for the purpose of convenience of transfer during the absence of Mr. Westcott." (Rec., 6574.)

Flagg testifies of that account:

"Q. * * * How do you know this account is Mr. Westcott's business?

A. Simply because he acknowledged it afterwards." (Rec., 2379.)

Westcott took those stocks (Lackawanna and Delaware & Hudson) to Reed & Flagg, and sold the Lackawanna stock, and got back and kept the Delaware & Hudson stock.

Flagg testifies:

"Q. Didn't you sell the stock later on?

A. That was for account of Mr. Westcott; a portion of it.

Q. You sold the stock?

A. A portion of it.

Q. And paid the money to whom?

A. Mr. Westcott.

Q. Didn't pay it to Captain Carter?

A. Never.

Q. To whom did you turn the *balance* of the stock over, *the unsold stock;* or for whose account did you turn it over?

A. Mr. Westcott." (Rec., 2383.)

That transaction took place on July 6, 1897, when Carter was not in New York. Westcott cancelled Carter's access to his safe-deposit box on that day; hence the Delaware & Hudson stock, which Reed & Flagg then turned back to Westcott, could not possibly have got into Carter's hands, because Westcott was not again in New York before Carter sailed for Europe on August 7, 1897. (Def. Ex. 10-G.)

Westcott testifies:

"Q. And can you state that you did not tell Mr. Flagg that you had given Carter full power of attorney to transact all business?

A. No, sir; I did not." (Rec., 11716.)

But Flagg testifies:

"A. Mr. Westcott came to us at the outset and introduced Captain Carter, saying that he was his son-in-law, in whom he had implicit confidence, and that he had given him full power of attorney to transact all his business, and that we were to recognize him in his stead, and do any business for his account that Captain Carter said." (Rec., 2380.)

Reed, the partner of Flagg, testifies:

"A. I have been acquainted with Robert F. Westcott since 1860,—'59 or '60; during the last 15 or 20 years very intimately: There could be no greater intimacy between any two families than existed between mine and his. I htink I may say I was his confidential friend. When Captain Carter married Miss Westcott, my granddaughter, who has always lived with me, was bridesmaid. From that time onward, Mr. Westcott always spoke to me of Captain Carter as his son, for whom he had great admiration, and in whom he had unlimited confidence. That confidence was expressed by some business which was done by Captain Carter, acting merely as a messenger as it were, or representative prior to 1895, when Mr. Westcott went abroad. To confirm what I say about intimacy, Mr. Westcott urged me to go with him abroad. I could not go. Mr. Westcott then informed me that he wished Captain Carter to represent him during his absence, and expressed to me and to my firm unbounded confidence in Captain Carter's loyalty to him, his integrity,—and stated that he would do everything for him as if he were here himself. * * * I never did from the first to the last any business with Captain Carter that I did not understand to be as the representative of his father-in-law, from the beginning to the end." (Rec., 888-9.)

Westcott testifies:

"Q. Did not Captain Carter state to Mr. Flagg in your presence, at the office of Reed & Flagg, that the business he had been transacting while you had been gone in

Europe, in the purchase of these bonds, was your business?

A. No, sir." (Rec., 11736.)

But Flagg testifies:

"Q. Did Captain Carter make any statement to you as to whose property this was, that is to say, whose money was being invested, and whose bonds they were when purchased?

A. He told me the business was R. F. Westcott's business.

Q. Told you what?

A. Told me the business was the business of Mr. R. F. Westcott.

Q. Was that in the presence of Mr. Westcott?

A. Yes." (Rec., 11065.)

Westcott testifies:

"Q. Now tell me what bonds you owned at that time (January 17, 1895) yourself?

A. None." (Rec., 11580.)

Yet Westcott gave Carter a power of attorney, signed by him and his wife, and dated January 17, 1895, which reads:

"and in our names, and each of our names, to sell any and all bonds of every kind and nature *now owned by us.*" (Rec., 11273.)

Westcott testifies of the securities he gave to Carter in October, 1897, as follows:

"Mr. Greene put in an appearance with the bonds. * * * I took possession of them. * * * I was very much surprised at the quantity." (Rec., 11257.)

"I was so astonished that I could hardly gather myself." (Rec., 11686.)

That Westcott stated a falsehood when he said that he was "surprised" or "astonished" as to those bonds is shown by the testimony of Charles McPherson, an expert accountant who had before him Westcott's checks, deposit slips, books of account, etc., and also says:

"Q. * * * There were 285 bonds delivered by Westcott to Carter on October 11 and 29, 1897, were there not?

A. Yes, sir.

Q. As to about $50,000 of these bonds, the Defendant's Exhibit 96-A, and the evidence in the case, show that Carter may have had about $50,000 of bonds from

his wife's estate, or from money which he had saved out of what Westcott gave him, don't it?

A. Yes, sir.

Q. That would leave about $235,000 of bonds thus accounted for, would it not?

A. It would.

Q. You have been over this line of bonds here, and gone into the history of those bonds, and Robert F. Westcott's checks, deposit slips, and so forth, and I will ask you if Robert F. Westcott stated at any time after September, 1897, that he knew nothing about this $235,000 worth of bonds, did he tell the truth?

A. He did not.

Q. You have before you, have you not, Mr. Westcott's checks, admittedly in his handwriting, his deposit slips in his own handwriting showing that during the years 1893, 1894, 1895, 1896 and 1897, he either purchased those bonds by checks admittedly his own, or he deposited the coupons off those bonds in deposit slips admittedly his own, or you have before you other documentary evidence produced by the complainant showing that Westcott knew about those bonds, either at the time they were purchased, or prior to the time this trouble commenced in September, 1897?

A. I have in my hand the checks in the handwriting of Robert F. Westcott, made out by him personally, for at least $230,000 par value of the bonds which he delivered to Captain Carter on October 11, 1897, and October 29, 1897, and I have before me the account of Robert F. Westcott with his bond brokers and with his bank, which show that Robert F. Westcott must have had personal knowledge of the purchase of those bonds, and of the transactions in relation to them, from the date of their purchase until he delivered them to Captain Carter in October, 1897." (Rec., 7432-33.)

"Q. If he stated, after this trouble commenced, in August or September, 1897, that he was 'surprised' with regard to those bonds, or 'surprised' that anybody had those bonds, did he tell the truth?

A. He did not tell the truth; and if he testified to such a fact his testimony was perjury." (Rec., 7432.)

For details concerning the methods Westcott used to know about his account over which he gave Carter power of attorney in 1895, by leaving Solley to watch Carter, see (Rec.,

7513-15; 7523; 7524; 7547-83; 7731). (See also Rec., 7897-99; 7902-04.)

For details concerning the mutilation of Westcott's check stub book for January, 1895, the misrepresentations therein, etc., see (Rec., 7257, 7439-7547).

Westcott was not willing to testify if Carter could confront him, for he says:

> "A. I had no intercourse with the Government at all until Carter's sentence was confirmed and he was in jail." (Rec., 11660.)

Westcott even testified on cross-examination, that he didn't know" the name of his daughter who married Carter (Rec., 11456); but he thought better of the matter the next day, and then "remembered" her name. (Rec., 11515.)

Another incident which throws much light on the value of the testimony of Westcott in that he admitted he "most always destroyed every letter" (Rec., 11457).

When Westcott refused to go before the Board of Engineers, because as he said it would disclose the business of the Vanderbilts he had been transacting, and he stated to Carter as heretofore mentioned:

> "If your Mama (Mrs. Westcott) and you and myself were on a sinking ship, and there was only one life preserver, I would have to have it myself." (Rec., 8789.)

—54—

A Man on Trial for Stealing Money Would Not Knowingly Receive the Stolen Money and Publicly Give Written Receipts for It.

For evidence that Carter received the securities openly, in prominent law offices of New York, at the very time he was on trial for receiving money from Greene and Gaynor, see References herein No. 25.

For evidence that on October 29, 1897, Carter had already received $63,000 from Westcott for the Orange property, and hence did not need money, see (Rec., 5670).

That Carter did not run the frightful risk of signing that receipt in order to get possession of the securities is shown by the testimony of Henry L. Stimson, who testifies that after Carter had received the securities and had signed and delivered the receipt for them, he offered to return them to Westcott. Stimson says:

> *"I remember that Captain Carter, after he had taken*

the securities, either alluding to a number of bonds which were among the securities, said to Mr. Westcott substantially this: 'Daddy, I want you to take these'; or 'Daddy, I want to give these to you.'" (Rec., 8883.)

—55—

METHOD OF PLACING FASCINES IN MATTRESSES.

W. G. Austin, who received a special medal under act of congress for distinguished bravery under fire, the government inspector who supervised the construction of about one-fourth of all of the multiple mattresses used under the big contract (Rec., 3241) testifies:

"A. I was in the employ on the Savannah harbor work from November or December, whatever time I returned from Augusta, until the following June or July, 1893." (Rec., 3241.)

"Q. In that time how many yards of mattress did you measure?

A. I measured probably from 200 to 225,000 square yards." (Rec., 3241.)

A. They were put in as closely as about four men could shove them in with their feet and hands. The gins sloped down from the barge. The grillage was put onto this gin, and the fascine was thrown down on it, and the first two or three along were fastened with wires, heavy wire; and then the next tier of fascines,—depending on the width of the mat as to how many fascines we used—were put and the men forced them down with their feet or hands, braced themselves and forced them down; in some cases, where a lever could be used, that was used to force them in.

Q. How about breaking the joints in the adjacent rows of fascines?

A. The joints were always broken; there was a lap of some three or four feet. (Rec., 3259.)

* * * * * *

Q. Do you know of any instances where the contractor was compelled to put in more fascines than the specifications called for, and if so, for what reason?

A. The specifications called for a fascine of nine inches in diameter, and quite frequently the fascines ran from a foot to a foot and a half. That depended on where

the barge load came from. If the barge load came from up the river, where they could procure straight brush, I suppose the fascines ran from a foot to a foot and a half. If it came from over on the sea islands, it was liable to be pretty close to nine inches; and as I have made no distinction as to which barge I should send to the mat gins, naturally both kinds came there, and when there was a large fascine a foot and a half in diameter used, the mat would have a very uneven appearance if it would not build up with two fascines; in the next there was a couple of 9-inch fascines put in, trying to make the mat level, without discarding the foot and a half fascines.

Q. Was that to the advantage or disadvantage of the contractor?

A. That is plain; it certainly was to the advantage of the government, and disadvantage of the contractor, *or the contractor's labor.* I don't know whether it was *his* disadvantage or not; I don't know how they were paid. It was an advantage to the government; as to whether it was to the disadvantage of the contractor himself, I do not know." (Rec., 3260-61.)

CAMPBELL FORD, a civil engineer who was a government inspector under the big contract, testifies:

"Q. * * * Begin at the bottom and tell me how that multiple mat was constructed?

A. Naturally the grillage was laid first of all, and wired together before the fascines were laid upon that, and wired to the poles, to the cross poles, and so on up to the top, the wires being carried through." (Rec., 12952.)

"Q. How were those fascines put into the mats; can you tell me?

A. On the mats they were put in precisely the same way as I have described before, put across the grillage and then wired through from the bottom to the top grillage.

Q. Were they tightly compacted or loosely laid in?

A. No, sir; they were laid up pretty tight.

Q. Any exertion on them by men, thoroughly to get them down?

A. They were well pushed up together.

Q. Any holes in the mat?

A. No." (Rec., 12955.)

WILLIAM N. CONNELL, a foreman who had charge of the construction of multiple mattresses from 1893 to 1897, testifies concerning the method of constructing a multiple mattress:

"A. It was built with a grillage of what they called full grillage poles; that is, poles running cross-wise of the skids, another layer running at right angles to those at intervals across about 6 feet, and those were wired with heavy wire." * * *

"A. Then on top of that, put a layer of brush, cross-wise of the top layer of poles of the grillage, and then at intervals of about six feet, when we got opposite a pole, get three or four men, or five men, on the bundle, and push it in as tight as they could, with their feet pressed against something they could get hold of; and then the rows of brush put on in that way; a layer of poles on top of that crosswise of the brush, and another layer of brush, until the top was reached." * * *

"A. It was wired through with what we call needles, long poles or iron bars, with a hold in the end of it, to be forced down through the mat, and a man would get underneath, and fasten it in the underneath grillage with pincers, drawn through to the top and wired on the top g illage and sewed around the outside edges." * * *

"A. It used to be considerable work to get the needle down through. It would be so tight that it would be hard to force it through, and two men would get hold of it and jerk it up and down, and sometimes drive it down with a board or something of that kind." (Rec., 13026.)

THOMAS F. GAYNOR, a foreman in charge of the construction of multiple mattresses from 1893 to 1897, testifies:

"A. We started first with the grillage poles." * * *

"Q. Were those poles fastened at the place where they crossed?

A. Yes, sir.

Q. How?

A. With wire." * * *

"A. On top of them was laid fascines, a layer of fascines." * * *

"A. They were shoved up tightly, close together.

Q. How were they shoved up, by men?

A. By men, yes.

Q. Tell me how they were put with reference to breaking joints or lapping?

A. They were lapped a foot to a foot and a half on each of them." * * *

"A. Then another row of poles were put on." * * *

"A. They were put on there, and then squeezed down with pliers; the man would stand on the pole, and another man fasten it with pliers." * * *

"Q. Now when you came to the top course, whether a 6 or 8-course mat, what was on the top?

A. There was a grillage of poles on top same as the bottom."

"Q. Now what was done with reference to fastening that top grillage to the bottom grillage?

A. Wires were drawn down through, and they were fastened." * * *

"Q. How did you get them down through?

A. What we called the needle." (Rec., 12984.)

OBERLIN M. CARTER produced photographs of the needles and levers used to fasten the multiple matresses together, and testifies as follows:

"Q. * * * I show you a photograph and ask you when that was taken?

A. My impression is that it was taken for an exhibit at the World's Fair, Chicago, showing the method of compressing the fascines between two grillages, the bottom and the top grillages, and also showing the needles, that iron needle, which was used in pushing the wire down through the mattress.

Q. The long pole, with the hook on the end, as shown in that photograph, was for what purpose?

A. For the purpose of compressing the mattress.

Q. And how was that done?

A. The hook was engaged in, I think, a piece of rope which was fastened to the bottom grillage, and this (indicating) placed on top of that grillage; and then with a fulcrum, using this as a lever, they were pried together, and when drawn together as tightly as they could be, they were fastened with wire; and that was done at various places, I don't know how many now, but enough to hold the grillages securely together.

Q. And the iron needle, what was that for?

A. This needle was made of varying lengths, depending on the number of courses in the mattress. The wire being attached to that, the needle was forced through

the mattress, and then pulled through, to get the wire through the mattress.

Q. How thick was the iron of that iron needle?

A. Very small, perhaps the size of my little finger, perhaps larger; so it could be shoved through readily." (Rec., 3632.)

For further details, see (Rec., 8130-32; 8182-85; 8323-24; 8356-62).

—56—

PRICES OF BRUSH MATTRESSES.

The character of the evidence in this case as to the value of the "brush mattresses" used is:

(a) Evidence that the contractors made abnormal profits by a "raid" on their laborers. (*Ante*, pp. 52-63.)

(b) Evidence that the contracts were honestly let at public bidding according to law at the usual market prices for such brush mattresses, and that "the contractors used more material" per square yard of mattress paid for than the contracts required. (Rec., 378.)

(c) The complainant's witnesses testify that Greene & Gaynor paid 16 2/3 cents per day and board for their labor. (Rec., 1993.) A very large part of the cost of brush mattresses was for labor; and the complainant's witnesses, reckoning labor at 25 cents per day (16 2/3 cents and board), which is what Greene & Gaynor paid, "estimate" the cost of said brush mattresses to Greene & Gaynor at about one-sixth of what defendants' witnesses testify was the market value thereof based on labor at the prevailing rate of $1.50 per day. (Labor, $1.50 per day, Rec., 806, 2561.)

So that the evidence may be said to be undisputed that the market value of the brush mattresses in controversy was about six times what complainant's witnesses "estimate" was the actual cost thereof to Greene & Gaynor, based on peonage wages of 25 cents per day, *i. e.*, 16 2/3 cents per day plus board.

There is no evidence whatever as to the actual cost of these mattresses to Greene & Gaynor.

The evidence as to brush mattresses is as follows:

1. Undisputed evidence of complainant's witnesses that the "estimated cost" to Greene & Gaynor of such mattresses at the wages paid by them to their laborers through peonage, *i. e.*, 16 2/3 cents per day with board, was about "15 cents"

per square yard, *i. e.*, about one-sixth the market value of those mattresses.

Both courts held as to the wages paid for labor by the contractors as follows:

> "The evidence discloses a shameful course of treatment of the workmen employed by the contractors in cutting and otherwise handling the brush used in these constructions. They were paid little or nothing over and above their living, and that, too, of the worst." (Rec., 381; 13417.)

2. The testimony of such government witnesses as A. S. Cooper, who was Carter's assistant engineer and who on August 7, 1897, just after Carter had left Savannah, stated in writing to Gillette, the complainant's chief witness, that 95 cents per square yard for brush mattresses was "about 1/3 to 1/2 more for the work" than the contractors "deserved" (Rec., 1345); and who on January 20, 1898, testified that he estimated the actual cost to the contractors of such mattresses to be "9 cents per square yard" (Rec., 1177).

3. Testimony of Cols. Black and Gaillard that memoranda given them by Gillette as to a "sample" mattress never seen by them which was made and sunk without Carter's knowledge after he had left Savannah, which admittedly contained only 4/9 of what the contract called for, would cost about 34 cents per square yard. (*Ante.*, 200-09.)

4. The following testimony and evidence of witnesses for both sides that the market value of such mattresses (reckoned at the prevailing market value of wages to laborers) was fully as much as the prices complained of, *i. e.*, from 95 cents to $1.10 per square yard in the work, under said contracts with Greene & Gaynor from 1891 to 1896:

Gen. T. L. Casey, Chief of Engineers, made written contracts for brush mattresses at Mayport, Florida, adjoining Carter's district, in 1888, at 74 cents per square yard (Rec., 13251); at Cumberland Sound, Florida, in Carter's district, in 1891, at 97 cents per square yard (Rec., 10091); at Cumberland Sound, Florida, in 1892, at $1.05 per square yard (Rec., 10145); at Winyaw Bay, S. C., adjoining Carter's district, in 1892, at $1.05 per square yard (Rec., 9262; 9265).

General Alexander Mackenzie, Acting Chief of Engineers, made a written contract for brush mattresses at Savannah, Georgia, in 1896, at 95 cents per square yard (Rec., 10371), and at Cumberland Sound, Florida, in Carter's district, in 1896, at $1.10 per square yard (Rec., 10393).

Gen. W. P. Craighill, Chief of Engineers, testifies speci-

cally in this case that he recommended the award of the Cumberland Sound contract of October 8, 1896, in Carter's district, at $1.10 per square yard. (Rec., 903; 12220.)

Gen. P. C. Hains, Corps of Engineers, made a written report to the Chief of Engineers in 1895 that a dollar per square yard was a fair price for brush mattresses at Cumberland Sound, in Carter's district. (Rec., 13200.)

Col. H. M. Adams, Acting Chief of Engineers, approved in writing the contract of July 20, 1891, at Fort Clinch, Florida, in Carter's district, for brush mattresses at 99 cents a square yard. (Rec., 10107.)

Col. W. S. Stanton, Corps of Engineers, made a written contract at Winyaw Bay, S. C., adjoining Carter's district, on November 8, 1892, for brush mattresses at $1.05 per square yard. (Rec., 9265.)

Col. W. H. Bixby, Corps of Engineers, made a contract at Winyaw Bay, S. C., adjoining Carter's district, in 1891 for brush mattresses at 70 cents per square yard (Rec., 9242; 9245), the contractor at that same place having failed at 57 cents per square yard in 1890. (Rec., 8492.)

Col. W. M. Black, Corps of Engineers, made a written report to the Chief of Engineers in 1895 that $1 a square yard was a fair price for brush mattresses at Cumberland Sound in Carter's district (Rec., 13200), and Col. Black testified that a contractor under him in the adjoining district failed in 1891 at 70 cents per square yard (Rec., 698). Col. Black actually constructed such brush mattresses in 1888, in the district adjoining Carter's, and Black testified in this case that the actual cost of those mattresses to the government without any profit, interest on investment, risk, etc., was from "60 to 65 cents" per square yard (Rec., 698).

Col. T. H. Handbury, Corps of Engineers, made a written report to the Chief of Engineers in 1895 that $1 a square yard was a fair price for brush mattresses at Cumberland Sound in Carter's district. (Rec., 13200.)

Col. F. V. Abbot, Corps of Engineers, made a written report to the Chief of Engineers in 1895 that $1 per square yard was a fair price for brush mattresses at Cumberland Sound in Carter's district. (Rec., 13200.)

Maj. T. H. Rees, Corps of Engineers, now Division Engineer at Chicago, who was Carter's assistant on the Savannah work, testified that the fair cost, without any profit, of the brush mattresses used in the Savannah district in 1893 was from 60 to 80 cents per square yard. (Rec., 2849.)

Maj. Harry Burgess, Corps of Engineers, made a written

report to the Chief of Engineers in 1895 that $1 per square yard was a fair price for brush mattresses at Cumberland Sound in Carter's district. (Rec., 13200.)

G. Y. Wisner, director of Am. Soc. of Civil Engineers, testified that the brush mattresses used at Savannah from 1891 to 1896 would cost at least 95 cents a square yard. (Rec., 2624.)

G. W. Brown, civil engineer, who was employed by Captain Carter on the work, testified from his own knowledge that the fair cost of the brush mattresses used in the Savannah district from 1891 to 1896 was from 80 to 85 cents a square yard. (Rec., 852; 985.)

R. S. Burnett, civil engineer, who was employed by Captain Carter on the work, testified from his own knowledge that the fair cost of the mattresses used in the Savannah district from 1891 to 1896 was about 81 cents a square yard. (Rec., 986.)

J. W. Rutherford, a civil engineer of 28 years' experience, testifies that $1.05 a square yard was a fair price for brush mattresses at Cumberland Sound in Carter's district in 1896. (Rec., 3160.)

J. W. Daniels, inspector, who was employed by Captain Carter and who inspected and measured a large part of the mattress work in the Savannah District, testifies that the mattresses used from 1891 to 1896 cost from 75 to 85 cents per square yard. (Rec., 995.)

W. F. McCauley, a competitive contractor and a witness for the complainant, testified that $1.13 the price he bid per square yard (Rec., 13239), was "very reasonable" for the brush mattresses used at Savannah under the 1892 contract. (Rec., 1014.)

Jacob Friday, a competitive contractor and the man who built the Charleston, S. C., jetties, testifies that the actual cost of the brush mattresses used in the Savannah district was from 80 to 90 cents a square yard. (Rec., 995.)

R. Moore, a competitive contractor, testifies that the lowest possible cost of the brush mattresses used in the Savannah district would be 60 cents a square yard, and that such cost would be increased 25 to 30 per cent. according to circumstances. (Rec., 1015.)

E. L. Friday, a competitive contractor, testifies that $1.12 a square yard was a "very reasonable" price for the mattresses used under the 1896 contract in Carter's district. (Rec. 996.)

S. W. Skinner, a competitive contractor, testifies that 95 cents to $1.10 a square yard was a reasonable price for the brush mattresses used in the Savannah district. (Rec., 1021.)

A. R. Stewart, a competitive contractor, testifies that $1 a

square yard is a fair price for the brush mattresses used in the Savannah district in 1896. (Rec., 651.)

R. G. Ross, a competitive contractor, who built the first brush mattresses ever used on the South Atlantic coast, testifies that the actual cost of such mattresses as were used in the Savannah district is about 90 cents a square yard. (Rec., 8794.)

Thomas E. Wallace, a competitive contractor, testifies that 95 cents to $1.10 a square yard is a reasonable price for the mattresses used in the Savannah district. (Rec., 1022.)

J. L. Grim, a competitive contractor, testifies that it costs from 80 cents to 95 cents a square yard to build the brush mattresses used in the Savannah district. (Rec., 1008.)

J. B. Sanford, a competitive contractor, testifies that the brush mattresses used in the Savannah district could not be built for less than from 95 cents to $1.10 a square yard. (Rec., 1020.)

I. H. Hathaway, a competitive contractor, who executed similar work on the St. Johns River, which is adjoining Carter's district, in 1892, testified that $1.10 per square yard for brush mattress in the Savannah district is reasonable. (Rec., 1009.)

J. A. Bryan, a competitive contractor, who bid on similar work at Jacksonville, which is adjoining Carter's district, in 1889 and 1891, testifies that $1.10 per square yard is a reasonable price for the brush mattresses used in the Savannah district. (Rec., 1034.)

It is thus seen that the evidence is overwhelming and uncontradicted that the prices paid to Greene & Gaynor were not usual market prices for such brush mattresses placed in the work, and that they made their abnormal profits—not by a "raid" on the Government—but by a "raid" on their laborers, from whom they obtained their labor for about one-sixth of its value.

Under such circumstances it is not strange that Greene & Gaynor tried to avoid a trial before a Georgia jury or that Robert F. Westcott, after Carter had been sent to prison, saved himself from being held as Greene & Gaynor's partner by trying to shift everything onto Carter.

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CONNOLLY AND WALSH.

The complainant finds it suspicious that one M. A. Connolly, a clerk in Carter's office, appears to have signed Gay-

nor's name to certain papers, and that one W. H. Walsh, the contractor at Fort Clinch, Florida, in 1891, had once been a foreman for Greene & Gaynor.

As to Connolly: He was United States Commissioner, and was employed to make out papers for Gaynor or any other bidder. (Rec., 754.)

That Gaynor had authority to sign the name of his brother-in-law, Anson M. Bangs, is shown by the undisputed fact that Bangs ratified what Gaynor did and turned over to Gaynor checks for the work done under his contract.

Whether Connolly actually signed the name of Bangs or Gaynor depends only on the testimony of Carvalho and Sterly, both of whom testified falsely in this case. (Wit. p. 9,; 66), and Connolly himself denies that he did so. (Rec., 754.) Connolly testifies as a witness for the complainant:

> "Major Adams: Mr. Connolly, did you ever draw up any bids for contract work of any contractors connected with the Savannah office?
>
> A. Well, when I was United States Commissioner in Savannah, for five years until June 30 of this year, and for five years preceding that, during all the time I was down there, I acted as Commissioner, United States Circuit Court Commissioner, *I did not make out any papers from any contractors but I had them swear to them.* They came before me and produced men who swore that they were sureties on guarantees. I made lots of those for lots of contractors in that district. I had an office in the United States Custom House by courtesy of the Marshal. I was appointed I think in 1891, early in the spring of 1891. I was United States Special Commissioner in Admiralty under rule 47 of the equity practice; and some one came to me one day and said, 'Mr. Connolly, here are some sureties on this work'—producing some specifications—and wanted me to swear them. I said I don't know whether I could as United States Commissioner in Admiralty swear these men in. It says underneath who could swear in the sureties. I wanted a judge's opinion on it first, but Judge Emory Speer, who is a District Judge, was at that time in Macon, and I wrote to the Judge and sent him a copy of the specifications and asked him if he thought that I—knowing that I occupied a position in a government office—could swear in these sureties. And Judge Emory Speer wrote me that I did not have authority to do so, but said in the same letter substantially

this: you can do this work as a United States Circuit Court Commissioner, and I herewith enclose your commission as a United States Circuit Court Commissioner, and now you will enjoy the dignity of being called judge. I remember that extract from it, it shows that he knew that I was in the office. Then after that, when anybody came to me in the office and asked me to do sureties, I did as I was legally empowered to do.

Major Adams: Were you at that time employed by Captain Carter?

A. Oh, yes; but the Judge liked me and gave me this appointment because he said he knew I deserved it, and thought I could fill it. Captain Carter objected at one time to this, and I told him that Judge Speer, who was a good judge of law and a good authority in such a case, wrote me that I could do it, so I continued to do it with my other commission work." (Rec., 754-55.)

As to Walsh: It is conceded that his bid was guaranteed as required by law, and that the work thereunder was properly done, but it is contended that he ought not to have been allowed to bid because he had once been a foreman for Greene & Gaynor.

But the bid of Walsh came from Fernandina, Florida, and Carter could not know that *W. H. Walsh* was the same man who some time before was known as *Welsh* in South Carolina (Rec., 4057). Besides, even if that were not true, there was no way to prevent Walsh from bidding, as is shown by the fact that in 1892 Walsh bid against Gaynor under Col. Stanton at Winyaw Bay, S. C. (Rec., 13233), and no fault was ever found with that.

—58—

Carter's Private Papers.

When Carter went to Europe in 1897, he left at Savannah, in the office of his successor, Gillette, all of his private papers, including his private letters, personal diaries and memoranda, check-stub books, canceled checks, receipted bills, etc.,—in short every private paper he had in the world.

When the Board of Engineers met at Savannah on September 21, 1897, and Carter learned that Gillette was insinuating that if the box containing Carter's private papers were opened, something might be found against him, Carter voluntarily wrote to the Board a letter giving them authority to examine all of these papers, saying:

nor's name to certain papers, and that one W. H. Walsh, the contractor at Fort Clinch, Florida, in 1891, had once been a foreman for Greene & Gaynor.

As to Connolly: He was United States Commissioner, and was employed to make out papers for Gaynor or any other bidder. (Rec., 754.)

That Gaynor had authority to sign the name of his brother-in-law, Anson M. Bangs, is shown by the undisputed fact that Bangs ratified what Gaynor did and turned over to Gaynor checks for the work done under his contract.

Whether Connolly actually signed the name of Bangs or Gaynor depends only on the testimony of Carvalho and Sterly, both of whom testified falsely in this case. (Wit. p. 9,; 66), and Connolly himself denies that he did so. (Rec., 754.) Connolly testifies as a witness for the complainant:

> "Major Adams: Mr. Connolly, did you ever draw up any bids for contract work of any contractors connected with the Savannah office?
>
> A. Well, when I was United States Commissioner in Savannah, for five years until June 30 of this year, and for five years preceding that, during all the time I was down there, I acted as Commissioner, United States Circuit Court Commissioner, *I did not make out any papers from any contractors but I had them swear to them.* They came before me and produced men who swore that they were sureties on guarantees. I made lots of those for lots of contractors in that district. I had an office in the United States Custom House by courtesy of the Marshal. I was appointed I think in 1891, early in the spring of 1891. I was United States Special Commissioner in Admiralty under rule 47 of the equity practice; and some one came to me one day and said, 'Mr. Connolly, here are some sureties on this work'—producing some specifications—and wanted me to swear them. I said I don't know whether I could as United States Commissioner in Admiralty swear these men in. It says underneath who could swear in the sureties. I wanted a judge's opinion on it first, but Judge Emory Speer, who is a District Judge, was at that time in Macon, and I wrote to the Judge and sent him a copy of the specifications and asked him if he thought that I—knowing that I occupied a position in a government office—could swear in these sureties. And Judge Emory Speer wrote me that I did not have authority to do so, but said in the same letter substantially

this: you can do this work as a United States Circuit Court Commissioner, and I herewith enclose your commission as a United States Circuit Court Commissioner, and now you will enjoy the dignity of being called judge. I remember that extract from it, it shows that he knew that I was in the office. Then after that, when anybody came to me in the office and asked me to do sureties, I did as I was legally empowered to do.

Major Adams: Were you at that time employed by Captain Carter?

A. Oh, yes; but the Judge liked me and gave me this appointment because he said he knew I deserved it, and thought I could fill it. Captain Carter objected at one time to this, and I told him that Judge Speer, who was a good judge of law and a good authority in such a case, wrote me that I could do it, so I continued to do it with my other commission work." (Rec., 754-55.)

As to Walsh: It is conceded that his bid was guaranteed as required by law, and that the work thereunder was properly done, but it is contended that he ought not to have been allowed to bid because he had once been a foreman for Greene & Gaynor.

But the bid of Walsh came from Fernandina, Florida, and Carter could not know that *W. H. Walsh* was the same man who some time before was known as *Welsh* in South Carolina (Rec., 4057). Besides, even if that were not true, there was no way to prevent Walsh from bidding, as is shown by the fact that in 1892 Walsh bid against Gaynor under Col. Stanton at Winyaw Bay, S. C. (Rec., 13233), and no fault was ever found with that.

—58—

Carter's Private Papers.

When Carter went to Europe in 1897, he left at Savannah, in the office of his successor, Gillette, all of his private papers, including his private letters, personal diaries and memoranda, check-stub books, canceled checks, receipted bills, etc.,—in short every private paper he had in the world.

When the Board of Engineers met at Savannah on September 21, 1897, and Carter learned that Gillette was insinuating that if the box containing Carter's private papers were opened, something might be found against him, Carter voluntarily wrote to the Board a letter giving them authority to examine all of these papers, saying:

"I give you full authority privately to open and examine all of its contents." (Rec., 6584.)

The Board not only took that box of private papers and opened and examined those papers, but those papers have been in the hands of Carter's enemies ever since, and admittedly have been for years, and are still in the hands of Edward Israel Johnson, the expert accountant for the government who swore to "forced balances" made out by him to ruin Carter. (Rec., 380.)

It is inconceivable that if these papers had contained anything derogatory to Carter, he would have gone to Europe and have left them in the hands of his successor, and would then voluntarily have turned them over for examination, when, if he had so chosen, he could have prevented such an examination.

In fact the Circuit Court says:

"Is it likely that he [Carter] would have left matters in such shape as to put himself and his honor into the hands of his successor" if he was guilty? (Rec., 379.)

Still, further, with every paper Carter ever had in the world in the hands of his enemies, both courts have found that those papers contained nothing to show wrongdoing in Carter's part, saying explicitly that there had never been found any "direct evidence" to show Carter's guilt. (Rec., 13425.)

—18a—

CASSIUS E. GILLETTE.

Some of the statements to the court of Cassius E. Gillette have already been considered herein, but perhaps a better idea of the sort of person this prosecuting witness Gillette really is, may be gathered from his own language, as spoken by him under oath on the witness stand; hence the following is given.

During the progress of the court martial trial, Gillette went to Major Thomas H. Rees, Corps of Engineers, United States Army (who had been summoned as a witness on behalf of Captain Carter), and threatened that, if Rees did not testify as Gillette wanted him to testify, he would ruin him also. On the witness stand Gillette related part of that conversation with Rees, testifying as follows:

"I says, 'Well, you are down here as a witness?' He says, 'Yes, I am still a believer in Carter.' I says, 'That

is all right, but * * * *there are two ways of stating the truth.* * * * You had better come up to the office and look things over.'" (Rec., 4173.)

Concerning this action of Gillette, Major Rees testifies:

"He went on to show me what he could produce against Captain Carter, particularly with reference to the Quarantine matter,—*which I knew all about and knew there was not anything to it,—tried to make that as black as possible,* * * * and told me to come up and he would show me lots of things." (Rec., 2915.)

Gillette then urged Rees to testify against Carter, on the ground that it would be to his interest to do so, saying, as Rees testifies:

"Now, you and I will be in the Corps of Engineers longer than Captain Carter; *I know that.* Now, we will have to be careful how we stand in this business." (Rec., 2914, 4173.)

When Gillette found he could not persuade Rees to testify falsely against Carter, Gillette then threatened to hurt Rees, saying to him, as Rees testifies:

"I realize that I am held socially, professionally and officially responsible for the charges against Captain Carter. I realize that it has come to be a fight between him and me; and when I am fighting, I fight hard, and *anybody who stands in my way is liable to get hit. It would make no difference if it was my best friend, I would hit him and hurt him if I could.*" (Rec., 2914-15; 4173.)

On the witness stand Gillette admitted he used that language to Rees, saying: "*I may have said what he said I did*" (Rec., 4173); and Gillette added:

"I have actively assisted in the prosecution of this case to the very best of my ability, in and out of this court, ever since I started, * * * from the sense of being held personally responsible for it." (Rec., 4180.)

Gillette further admitted, on the witness stand, that when he threatened to "hit" and to "hurt" anybody who stood in his way, he made that threat against Rees for the following reason:

"*The whole point of the conversation, when I said I would not spare my best friend, was to give him, as delicately and as decently as I could, a hint of what would happen to him, if he (Rees) testified before this court in a biased manner, which would give the court wrong impressions.*" (Rec., 4173.)

It may be useful to consider also the following additional statements made by Gillette to the court:

(a) Gillette states to the court that General Gillmore had paid only 94c a cubic yard for brush-fascine mattresses at Savannah in 1885 (Ex. 192); the truth being that the contractors refused to accept the price of 94c (Rec., 8844), and then Gillmore paid them $1.20 per cubic yard for fascines which were *not* made into mattresses. (Rec., 8277.) (Rec., 10754.)

(b) Gillette states to the court that under a contract at Savannah in 1889, Carter paid $1.42 a cubic yard for "fascine and pole mattresses" (Ex. 193); the truth being that no fascine and pole mattresses were purchased at all under that contract, Gillette's sworn statement being pure fiction. (Rec., 9961 *et seq.*)

(c) Gillette sttaes to the court that under a contract at Darien in 1892, Carter paid 89c a cubic yard for fascine mattresses (Ex. 193); the truth being that no mattresses of any kind were purchased under that contract, Gillette's sworn statement being pure fiction. (Rec., 10193 *et seq.*)

(d) In order to make a brush-log mattress look very thin, up and down, Gillette represents in his drawings that each round brush log occupies a space of only 9 inches, up and down (Rec., 8782); but in the same drawing, in order to make it appear that only a few brush logs are needed to make a brush-log mattress, he makes the same round nine-inch brush log occupy a space of 19 1/5 inches sideways. (Rec., 8782.)

(e) In order to show the binder or "grillage" poles in the brush-log mattresses smaller than they really are, Gillette represents the brush logs on his drawings as nine inches in diameter, and the binder poles as less than one-fourth of the diameter of the brush logs, which would make the poles less than two and one-fourth inches in diameter (Rec., 8783); whereas the contract called for poles at least four inches in diameter (Rec., 10156), and such four-inch poles were always used. (Rec., 8783.)

(f) Two kinds of brush-log mattresses were called for by the contracts, and Carter had the right to use either. (Rec., 10155-57.) He used the "third" design instead of the "second" design. Gillette therefore thinks Carter ought to have used the "second" design; and in order to represent the "second" as more expensive than the

"third" design, Gillette shows in his drawings, twice as many binder poles in the "second" design as the contract called for. (Rec., 10155.) (Rec., 8782.)

(g) In order to make the saw-log mattress, which Carter did not use, appear very expensive, Gillette represents in his drawings one hundred saw logs of an average diameter of one foot, laid side by side, as what would be put in a saw-log mattress one hundred feet in width. Those logs were each fifty feet long, and were never exactly straight, and always had knots on their sides, or places where the limbs had not been cut exactly close, hence it was physically impossible to put one hundred such logs side by side in a space one hundred feet wide. (Rec., 8097.) All the witnesses testify that not more than sixty-five of such logs could be laid side by side in a space of one hundred feet, yet Gillette's drawings try to mislead the court by showing one hundred such logs laid side by side in a space of one hundred feet. (Rec., 4510.) (Rec., 12115.)

—39a—

THE GOODYEAR CHARGES,

C. P. Goodyear, who testified against Carter, was a lawyer of Brunswick, Georgia, near Savannah.

Goodyear testified he had once been a lawyer, but said that in 1891 he had "abandoned the practice of the law", and had begun to explode dynamite on the ocean bar at Brunswick, Georgia, for the purpose of attempting to deepen the channel there (Rec., 10546, 10535). He testified he had lost in that venture "what little I had in the world." He testified that in 1892 his work at Brunswick was examined officially by Captain Carter, whom he said he had only known "casually" (Rec., 10558); that Carter reported his work was not successful (Rec., 10548); that after this report he was greatly incensed at Carter, and had a violent quarrel with him (Rec., 10556); that he then got an order for other officers to inspect his work (Rec., 10551); that those officers also reported adversely to him, as many as three times (Rec., 10551); and that he then had a quarrel with them (Rec., 10556).

Goodyear had a bill introduced in Congress, seeking to get exorbitant prices for some Government work, and Carter reported against it to his Chief, who submitted Carter's letter to the Senate Committee on Commerce (Rec., 8220).

Letters and telegrams from Goodyear to Carter, which are now in evidence, and which are admitted by both sides to be ginuine, show that Goodyear was continually bothering Carter about his "dynamite project," and that Carter considered him a "crank" (Rec., 8227). Goodyear wrote to Carter on November 14, 1892, begging for a "private interview" (Rec., 8221); Carter did not grant that interview, and then Goodyear came to Savannah on Thanksgiving day, November 24, 1892, and in writing sought an interview which Carter did not grant (Rec., 8221-22); Goodyear then telegraphed to Captain Rees (who was Carter's assistant) on December 2, 1892, begging for an interview with Carter which he did not get (Rec., 8223); Goodyear then wrote to Carter on December 4, 1892, begging for an interview which he did not get (Rec., 8225); Goodyear wrote again to Carter on December 6, 1892, begging for an interview which he did not get (Rec., 8225); Goodyear wrote to Carter again on December 22, 1892, begging for an interview which he did not get (Rec., 8225); Goodyear then wrote to Carter again on December 25, 1892, begging Carter to help him out on his dynamite work as far as Carter "consistently" could (Rec., 8225); Goodyear wrote again to Carter on January 16, 1893, begging for an interview and asking for such help on his dynamite project as Carter could "with propriety" give (Rec., 8225); and Goodyear wrote to Carter again on January 28, 1893, begging for help in connection with his dynamite work (Rec., 8225).

Goodyear remained quiet during the court martial, although he lived at Brunswick (which is near Savannah), and must have known all about it; but later on, in 1900, he fell in with Captain Gillette, who gave him a Government contract for dredging at sixteen cents per cubic yard, which same work Gillette swore before the court martial in 1898 was worth only ten cents per cubic yard. (Rec., 8229.)

About this same time, Goodyear became a witness for Gillette, and evidently forgetting his numerous letters and telegrams to Carter, in November and December, 1892, and January, 1893, he testified that, during those same months, when he had "lost what little I had in the world", and when he was repeatedly begging an interview with Carter, and was asking Carter to help him out on his dynamite scheme, as far as Carter "consistently" could, and so far as Carter could "with propriety do," Carter was offering him $250,000 to abandon his dynamite scheme and go in with Greene and Gaynor. Goodyear says this proposition was made to him on November 24, 1892, and that he took it under advisement, but that some

time in December, 1892, "that proposition was definitely declined." (Rec., 10545.)

Goodyear is not corroborated by any witness, nor by any documentary evidence, and it is needless to say Carter denies flatly that any such interview as Goodyear testifies about ever took place, and Carter testified that Goodyear's entire story is pure fiction. (Rec., 8217.)

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THE ALLEGED OPPRESSION OF A. J. TWIGGS.

The next charge against Carter is that he oppressed one A. J. Twiggs because Twiggs was a competitor of Greene and Gaynor. Great stress is laid by the complainant on this charge, hence it is considered in detail.

This man, A. J. Twiggs, is a brother of Marion Twiggs and a first cousin of P. E. Twiggs, both of whom were put on the Government pay rolls by Gillette (Rec., 1677, 1150, 1284). Twiggs was a contractor living at Augusta, Georgia, who admitted on the witness stand that he was not able in 1893 to handle a $17,000 contract (Rec., 11147), yet who, after he had testified against Carter, was given by Gillette, Government contracts of about $150,000. (Rec., 4463-64.)

(1) Twiggs testifies that in 1891 he accepted a bribe of $500 not to bid on the Government work at Augusta, Georgia (Rec., 1650); that he then got a sub-contract from Gaynor, who was the lowest bidder on that work, but that Gaynor would not let him perform it (Rec., 11103-04); and that he then sued Gaynor and got damages against him. (Rec., 1675.)

(2) Twiggs then got a contract for himself in 1893, for $17,000 of work at Augusta. (Rec., 11104.) He swore that when he got it he did not think he could do it as the contract required (Rec., 11147), but that he did not expect to comply with the terms of the contract when he entered into it. (Rec., 11147.) Conant, the Government engineer who supervised that contract, testifies as a Government witness that Twiggs was inexperienced and inefficient (Rec., 494), and that he had incompetent and insufficient help. (Rec., 1589; 1593-94; 1608; 1610.)

(3) Carter gave Twiggs two extensions of his contract of 1893 (Rec., 1607), but Twiggs could not carry it out, even then; so Carter helped him out by having Government employes do part of the work for him, and to avoid injuring him, his contract was not annulled by Carter (which would have pro-

hibited his getting any other Government work), but a supplemental contract was entered into instead. (Rec., 8172.)

Twiggs swore he did not like Conant, the Government engineer over him (Rec., 1683), but he never "breathed a word" to the inspectors about ever having been required to do anything save what his contract demanded of him. (Rec., 12949.)

(4) Twiggs remained quiet from 1893 until he allied himself with Gillette in November, 1897 (Rec., 11157), after which he got the $150,000 of Government contracts from Gillette. Twiggs admitted that at Gillette's request he began on November 22, 1897, to take photographs for use against Captain Carter before the court martial, yet the court martial had not even been ordered at that time. (Rec., 11128; 11154-55; 11157.) Twiggs then swore for Gillette that *he* had been "oppressed" by Captain Carter in 1893 (Rec., 11115), but that the brush fascines Carter permitted Greene and Gaynor to use under the big contract (and which General Craighill swore produced one of the most successful harbor works in the world) were "made of weeds with yellow flowers on them." (Rec., 11110.)

(5) Twiggs swore that Captain Carter permitted Gaynor to use small split stakes to fasten the brush fascines to the river bank, while Carter required him (Twiggs) to use large round stakes (Rec., 11114-15); but Conant, the Government engineer in charge, swears that Twiggs was also permitted to use split stakes (Rec., 3215), and that the stakes used by Twiggs were just the same as those used by Gaynor. (Rec., 3228.) Major Rees, of the United States Engineers, who was there when Gaynor's work was done, and who examined the work done by Twiggs, also swears that the stakes used by Twiggs were just the same as those used by Gaynor. (Rec., 3126; 3130.)

(6) Twiggs produced photographs, which he swore were "correct," and which he claimed showed he had done good work in 1893, while Gaynor had done bad work in 1891 (Rec., 1673) (Rec., 11129; 11154-55); but Major Rees, United States Engineers, who investigated those photographs, swears that Twiggs took the photographs of the Gaynor work from a point where the brush was covered with sand and gravel, so as to make it look as if the brush had disappeared, whereas if he had taken those photographs from another point, they would have shown the brush work still in good condition. (Rec., 3128.)

(7) Twiggs swore that in 1891 Gaynor bid on the work at Augusta, Georgia, through "one of Mr. Gaynor's employes" (Rec., 11134); the truth being that Gaynor bid on that work in

person, and not through one of his employes. (C. M. Def. Ex. 24.)

(8) Twiggs swore that in 1891 Gaynor bid a price on the work at Augusta, Georgia, so high as "just about to cover the appropriation" (Rec., 11134); the truth being that Gaynor bid only $20,435, whereas the appropriation was $25,000. (C. M. Def. Ex. 24.)

(9) Twiggs swore that in 1891, after he had accepted a bribe of $500 not to bid on that work at Augusta, Georgia (Rec., 1650), Gaynor told him that "nobody else is going to bid," and that, to make sure, Gaynor then "wrote a note"—which Twiggs said he "thought" went to Carter (Rec., 1652)—and got a reply, and then said, "No, there is no other bid put in; we are all right" (Rec., 11134); the truth being that there were three bidders on that work. (C. M. Def. Ex. 24) (See also Rec., 8245).

(10) In order to make it appear that Carter "oppressed" him, Twiggs swore that if his fascines were six inches less than the prescribed lengths of 12 or 20 feet, they were rejected, while if they were six inches over those lengths, he was obliged to cut them off. (Rec., 1659.) (Rec., 11163.)

But the truth is,—as sworn to by Major Rees, United States Engineers, and by Messrs. Conant and Ford, the Government inspectors in charge,—no fascines made by Twiggs were ever rejected because they were too short, and none were ever cut off because they were too long. (Rec., 3127; 3142; 3216.)

(11) In order to make it appear further that he was oppressed, Twiggs swore he was interfered with by Conant, the Government engineer, who he said was often late or absent, and that he could do nothing in such cases, but had to hold his entire force idle until Conant's arrival. (Rec., 1661.)

But the truth is,—as shown by the official records, and by the testimony of Conant and Ford (the Government inspectors),—Twiggs actually worked whenever he desired, whether Conant was present or not. (Rec., 3143; 3217.)

(12) In order to make it appear that he was harassed by Carter, Twiggs swore he was delayed because he was not permitted to work on more than one dam at a time. (Rec., 1661.)

But the truth is,—as shown by the official records, and by the testimony of Conant and Ford,—Twiggs worked on many dams at the same time, and was permitted to work at just as many points at once as he desired. (Rec., 3217; 12958.)

(13) In order to make it appear that Carter was exacting with him, Twiggs swore that if his work was only six inches

out of line, he was obliged to get a steamboat and haul it back into the exact place. (Rec., 11117.)

But the truth is,—as shown to by Major Rees, and by Messrs. Conant and Ford,—Twiggs was allowed great latitude, and his work was accepted even up to two feet out of its required place. (Rec., 3127; 3143; 3219.)

(14) In order to make it appear that he was much injured, Twiggs swore Captain Carter made him built such heavy fascines that "four or five" was a good load for four mules. (Rec., 1677.)

But the truth is,—as sworn to, for the complainant, by Amory Sibley, the foreman who hauled those fasciñes for Twiggs,—they hauled "18 or 20" of those fascines at a load. (Rec., 1719.)

(15) In order to make it appear that he was abused and persecuted, Twiggs swore he had made several hundred good brush fascines, but that Captain Carter made him take them all apart, and make them over into bundles of bare poles. (Rec., 11108.)

But the truth is,—as sworn to by Conant, the Government engineer,—Twiggs had only about 50 so-called fascines; they were not choked, and were entirely unsuitable for the work; Twiggs did not know how to make fascines; and Carter simply showed him how to make them. (Rec., 1583.)

(16) In short, the truth of the whole matter is,—as testified to by both Major Rees and Mr. Ford,—the work done by Twiggs was just the same as the work done by Gaynor (Rec., 3130; 3137) (Rec., 12954); but after Twiggs was employed by Gillette in 1897 to manufacture evidence for use against Carter before the court martial, and to testify against Carter (Rec., 11154-55) (Rec., 8243), Twiggs discovered for the first time that Carter had "oppressed" him. Gillette admitted on oath that after Twiggs testified against Carter, he (Gillette) gave Twiggs about $150,000 of Government contracts, of which some $35,000 was without any semblance of competition (Rec., 4464), one of those contracts being in another name, but Twiggs being the agent (Rec., 4464), and that for this work Gillette paid Twiggs 48c *a cubic yard for brush fascines, and* 75c *a cubic yard more for making them into mattress form* (Rec., 4570); whereas Carter paid Twiggs for that very same work only 74c *a cubic yard for both the brush fascines and for making them into mattress* form: (C. M. Def. Ex. 24.) (See also Rec., 8240-54.)

It is contended further by the complainant that although Carter helped Twiggs out by extending his contract for one month, when there was a freshet in the river, yet he nevertheless op-

pressed Twiggs by not extending his contract indefinitely; whereas Carter had extended for some months a contract for work above Augusta done by Greene and Gaynor.

There is no comparison between the two contracts. The work done by Twiggs was *below* Augusta, where the river, which is navigable by steamboats, was in good condition for the work to be done; whereas the work done by Greene and Gaynor was in a torrential stream *above* Augusta, where the river is navigable only by canoes, or other small craft, pushed along by poles, and where the water was so high that the United States could not designate the points for the work to be done, and it was imperative to await lower water. (Rec., 8428.)

—41a—

GAYNOR AND TWIGGS.

The next charge against Carter is that he favored Gaynor in a contract at Augusta, Ga., and oppressed one A. J. Twiggs who had a contract at the same place.

The claim is that Gaynor was allowed to put in much more than the estimated quantity of brush, and that (as Gillette says) when Twiggs had a contract, "it is the other way." (Rec., 445.)

The undisputed documentary evidence in this case shows conclusively that 7,500 cubic yards of brush were estimated in both the Gaynor and the Twiggs contracts at Augusta, Ga., which is the only point where both Gaynor and Twiggs did work; that Gaynor was allowed to put into the work only 4,861 cubic yards, or 65 per cent., of the estimated quantity; whereas Twiggs was allowed to put into the work 7,232 cubic yards, or 96 per cent. of the estimated quantity. (Rec., 13321.)

FILE COPY

Supreme Court of the United States

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1909.

No. 552

OBERLIN M. CARTER, et al.,
Cross-Appellants,
vs.
UNITED STATES OF AMERICA,
Cross-Appellee.

BRIEF OF MR. JOHN B. DAISH.

STATEMENT OF THE CASE.

This is a suit in equity. The theory of the case, as shown by the complainant's bill, is: That a conspiracy was entered into by certain parties, of whom some are defendants herein; that the preconceived purpose and design of the conspiracy was to defraud the complainant; that actual fraud was committed by the conspirators to the great loss and damage of the complainant; that the defendants were in possession of certain property and securities derived directly or indirectly from and through said conspiracy, being a part of profits from certain work

done and labor performed for the complainant; and that said property and securities (or the exchanges or proceeds thereof) constitute a trust fund for the benefit of the complainant.

The gravamen of the decree of the Circuit Court (Decree March 21, 1908; Rec., p. 389) is:

> "That all moneys in any way arising from the profits realized by the contractors under the river and harbor contracts described in the bill and auxiliary bills in this case, constitute a trust fund * * * which in equity and good conscience is for the benefit of and belongs to the complainant."

This brief deals only with the relations of L. D. Carter and I. S. Carter to the case.

The appellees, L. D. Carter and I. Stanton Carter, who are also cross-appellants, were defendants below to the original bill. It is there alleged that Oberlin M. Carter transferred to these defendants certain real estate, stocks, bonds and notes and that the said L. D. Carter and I. S. Carter agreed to co-operate with Oberlin M. Carter in holding and concealing the same; that the said L. D. Carter and I. S. Carter have brought into the jurisdiction of the court certain investments and proceeds and rents of the Eighth avenue, New York and Orange, New Jersey, properties, which said amounts are alleged to be held for the benefit of Oberlin M. Carter and with full notice of the rights and equities of the complainant. (Rec., 28.)

It is also alleged that I. Stanton Carter under power of attorney from Oberlin M. Carter mortgaged the New York property for $23,000. (Rec., 28-29.)

It is further alleged that I. Stanton Carter has collected some $3,000 in money as net rents and profits of the Eighth avenue, New York, and Orange, New Jersey, properties (Rec., 29); and that he has collected coupons upon various bonds amounting to $950 (Rec., 30); also that he has purchased certain bonds for the market value of $2017.01 which he is alleged to hold under an implied trust to account to the complainant. (Rec., 31.)

The bill alleges that L. D. Carter has collected net rents and profits of the Eighth avenue, New York, and Orange, New Jersey, properties amounting to $2200 (Rec., 30); also that he has sold certain securities aggregating $25,152.14 (Rec., 31); and that from the proceeds of said money he purchased 21 bonds Kentucky Central Railway.

It is alleged in paragraph 9 of the bill (Rec., 39) that these defendants joined the conspiracy at the time of Oberlin M. Carter's conviction by court martial and continued in it up to the time of the filing of the bill, and have been active in aiding and abetting Oberlin M. Carter in holding and concealing the assets.

It is further alleged that a certain power of attorney, dated about October 2nd, 1899, was executed by Oberlin M. Carter, authorizing I. Stanton Carter to convey the Eighth avenue, New York, and Orange, New Jersey properties (Rec., 39); that pursuant to said power of attorney the Eighth avenue property and also the Orange, New Jersey, property was conveyed to L. D. Carter, which said property these defendants are alleged to hold under an implied trust. (Rec., 40-41.)

The bill also alleges (Rec., 41) that these defendants collected the rents, issues and profits of the property secreting the same.

The prayers of the bill (Rec., 42), except the prayer for service, are

(a) for a temporary receiver, and a receiver *pendente lite;*

(b) for a cancellation of the power of attorney;

(c) for a restraining order preventing a conveyance or encumbrance of any of properties;

(d) permission to add parties, if found necessary;

(e) publication against non-residents;

(f) prayer for general relief.

The specific prayer for relief against these defendants is:

> "(3) That the court will in due course by its final decree declare all of the aforesaid investments within the jurisdiction of the court, into which the funds so intrusted to said Oberlin M. Carter as disbursing officer and so fraudulently diverted to his own use as aforesaid, in the hands of the defendants and of all persons holding the same for the benefit of said Oberlin M. Carter, or taking the same with notice of fraud, are properties held in trust for orators and will decree a delivery of the same or proceeds thereof to your orators or a conveyance of the same to your orators, on a sale of the same and the delivery of the proceeds to your orators as the nature of the case and justice may require." (Rec., 42.)

A temporary receiver was appointed in the cause *ex parte;* said receiver demanded by letter of these defendants certain bonds. To these demands response was made that none of the property demanded (except as stated) was in the hands of these defend-

ants and the objection was raised that a receiver was appointed *ex parte* and that the time of the demand was premature.

The defendants demurred to the bill (Rec., 103-106); also answered the rule to show cause for appointment of receiver. (Rec., 111-112.)

Upon motion for rule for contempt and order thereon (Rec., 99-100) these defendants answered (Rec., 113-117); on the rule for contempt and the answer thereto, no proceedings were had.

While the parties were in this position, the Stipulation of November 6, 1901, was entered into. (Rec., 119.) This agreement is given at pages 119-122 and 13419-21 of the record.

This Stipulation was approved by the court. (Rec., 122.)

After the execution of the Stipulation these defendants were under an obligation to

(a) turn over to the receiver assets (which had been or might thereafter be traced to them) and proceeds, income and re-investments thereof, *except* what had not theretofore "been *bona fide* disposed of and therefore beyond their control"; but the court should determine the ownership of one Kentucky Central bond and one Michigan Telephone bond claimed personally by I. Stanton Carter.

(b) "give all the information they can in regard to what property has been disposed of and its disposition."

(c) dismiss demurrers and file answers.

(d) "turn over to the receiver at least substan-

tially all of the assets turned over to I. Stanton Carter and L. D. Carter by J. H. Paul, R. E. Westcott and James Bragg, their proceeds and reinvestments, except such as have been, prior to the receivership, bona fide paid out or pledged by them for attorney's fees," etc.

In accordance with the Stipulation the demurrers were dismissed (Rec., 123), and answers filed (Rec., 139-141), and the defendants turned over to the receiver on November 11, 1901 (Rec., 297), everything which they understood was called for by the Stipulation.

As soon as possible, and on December 23, 1901, the defendants submitted to the complainant a statement showing what had been paid out by them (Rec., 4990), as they were obligated to do under the provisions of the Stipulation in order to show what had been "heretofore *bona fide* disposed of by them and therefore beyond their control" (par. 2 of Stipulation) and (par. 9) "such [assets, proceeds and reinvestments] as have been, prior to the receivership, bona fide paid out or pledged by them for attorney's fees," etc. [Paul, Westcott and Bragg securities.]

For nearly two years, no action was taken by the complainant, save an application for leave of absence by complainant's solicitor and consequent delay of proceedings to correspond. On October 15, 1902, there was a reference to a master (Rec., 148), who was ordered to report:

(a) Whether any assets remain to be accounted for or turned over by the defendants under the stipulation of November 6, 1901.

(b) Whether Lorenzo D. Carter and I. Stanton Carter have turned over to the receiver "substantially all of the assets" turned over to them by Paul, Westcott and Bragg, "or their proceeds and reinvestments except such as has been prior to the receivership bona fide paid out," etc. And if any assets had not been turned over, or properly accounted for, then to report what has not been so accounted for.

(c) That if I. S. Carter and L. D. Carter had not already turned over or accounted for such assets, that the master should before reporting his findings afford them an opportunity to appear and properly account.

Certain credits claimed by the Carters being disallowed, the master found that $9,343.15 of the Paul, Westcott and Bragg assets were not accounted for (Rec., 5070), whereupon on March 13, 1903, L. D. Carter turned over $10,000 (Rec., 151); and thereupon, on April 15, 1903, the master reported that he "finds that all of the receipts from said Paul, Bragg and Westcott are accounted for by the said defendants in accordance with the contract of November 6, 1901." (Rec., 5071.)

When this report of the master was heard by the Circuit Court on exceptions, to wit, January 7, 1904, the court set aside for the time being certain allowances made by the master for salaries to L. D. Carter and I. S. Carter and reserved the same for the hearing on final decree. (Rec., 150.)

The court then ordered the defendants to turn over additional bonds remaining in their hands, and

the court directed that thereupon clauses (1), (7) and (8) of the agreement of November 6, 1901 (Rec., 151), should go into operation; with this order the Carters complied on the following day (Rec., 305-6).

The securities turned over on March 13, 1903, by L. D. Carter, amounting to $10,000, and the securities, amounting to $13,000, turned over on January 8, 1904, by L. D. Carter and I. S. Carter, pursuant to the order of the Circuit Court, are the only securities as to the transfer of which there has ever been any claim of delay.

On the present state of the record, there are deficiency decrees against L. D. Carter and I. S. Carter aggregating $25,781.22, which their testimony shows was paid out by them for Oberlin M. Carter, but for which they had no receipts; the evidence also shows that some of the parties denied receiving the money; and the Carters were unable years after the payments were made to prove the payments *according to the strict rules of equity.*

Attention is respectfully directed to the wording of the Stipulation of November 6, 1901, in this, that it only required the defendants to *"give all the information they can"* with regard to such payments. There is no claim or suggestion that L. D. Carter or I. S. Carter or Oberlin M. Carter failed to comply with this provision of the agreement. Nevertheless the master required L. D. and I. S. Carter to establish their credits according to the strict rules of evidence, although they were charged in the bill with criminal fraud as to all such matters.

By this strict accounting, in arriving at the amount of the deficiency decrees, L. D. Carter and I. S. Carter were held liable for $25,781.22, but the master found that the amount of $21,529.15 (Rec., 5070) came from sources other than Paul. Westcott and Bragg, thus leaving only $4,252.07, against which I. Stanton Carter was entitled to a credit of $3,450 on account of salary (Rec., 320-1), according to the admission of Marion Erwin, special assistant to the Attorney General, and solicitor for complainant. That is to say the amount of Paul, Westcott and Bragg property, as stated by the complainant, was $349,475.00 (Rec., 247), for which I. Stanton Carter and L. D. Carter receipted (Rec., 247). The alleged withholding of $4,252.07 is a trifle over one per cent. of said amount and that, it is respectfully suggested, is clearly within the meaning and intent of the words, "substantially all," found in said stipulation.

The Circuit Court of Appeals in its opinion in said causes (Rec., 13,433) failed to give the full credit for salary, *which is admitted as just by complainant*, and described in complainant's exception to the Master's report as follows:

> "to that extent, to wit, 23 months, at $150 per month, $3,450, we concede that I. Stanton Carter would be entitled to credit, under the second clause of the agreement of November 6, 1901, as being so much of the assets actually disposed of by him prior to the receivership, and, therefore, beyond his control." (Rec., 320-1.)

This reduces the alleged shortage to $802.01.

To the Master's report, exceptions were filed (Rec., 353-356; 5073-5076). The matter of deficiency

decrees was disposed of by the decree of March 21, 1908, as follows:

"(6) It is further ordered and decreed that the said I. Stanton Carter and L. D. Carter, having executed deeds of conveyance conveying to Frank W. Hubby, receiver under said auxiliary bills in New York and New Jersey, the property described in the bill as the 8th avenue, New York, property, and the Orange, New Jersey, property, and said deeds of conveyance having been left with Max H. Whitney, receiver in this cause in escrow to abide the decree in this cause, it is now decreed that said deeds be delivered up to said Hubby, receiver, free from all claims of said I. Stanton Carter and L. D. Carter and O. M. Carter, in, of, or to said properties described in said deeds." (Rec., 393.)

* * * * *

"(9) It being provided in the fourth clause of the stipulation of the parties dated November 6, 1901, that:

'L. D. Carter and I. Stanton Carter will forthwith dismiss their demurrers, and file answers disclaiming any personal interest in the aforesaid assets in controversy in this litigation, including the real estate on Eighth avenue, New York, and at Orange, New Jersey, except as to two bonds claimed by I. S. Carter.'

And the issue as to whether the said two bonds were purchased from the trust fund, being left in the stipulation to the determination of the court, and the finding of the Special Master approved by the court, being that said two bonds were purchased with the trust fund, it is adjudged, and decreed that all liens or claims made by L. D. Carter or I. S. Carter as against any of the assets hereinbefore awarded the complainant are denied.

(10) It is further adjudged, ordered and decreed that the claim of the complainant to have

a deficiency judgment against L. D. Carter is denied.

* * * * *

(12) It is further adjudged, ordered and decreed that the said United States do have and recover of and against the defendant, I. Stanton Carter, the sum of Eleven Thousand Four Hundred and Fifty-four Dollars and eighteen cents ($11,454.18) for the amount of the said trust fund, not accounted for by him as found by the special master."

The opinion of the Circuit Court of Appeals as respects L. D. and I. S. Carter are as follows:

"3. The several provisions of the decree respecting the defendants Lorenzo D. Carter and I. Stanton Carter, next arise for review, and being of like class are grouped for consideration. Those provisions upon which the appellant, United States, assigns errors are: (1) Denial of a deficiency judgment against L. D. Carter; (2) adjudication against I. Stanton Carter for $11,454.18, as the amount of trust funds in his hands not accounted for; and these in turn rest upon findings of a master (on reference of special issues involved in their possession of securities), and exceptions overruled, upon which various errors are assigned, for allowances made to these defendants for expenses and services."

* * * * *

"(1) The errors assigned for denial of a deficiency judgment against L. D. Carter are, in substance: that he failed to pay over trust funds traced to his possession and admitted by him as received; and that he was relieved from accountability therefor by allowances for expenses and services, which are alleged to be inequitable under the circumstances disclosed. The credits referred to are (a) for various claims for expenses incurred, aggregating $2,379.43 in excess of undisputed expenses, which are complained of

as excessive and unsupported by credible testimony; and (b) an allowance of $12,916.66, for salary claimed due from Captain Carter for services as attorney-in-fact, under an agreement for $10,000 per annum. Upon the objections raised to items of expense allowed, we believe the findings of the master, approved by the trial court, should not be disturbed, as the stipulation (November 6, 1901) between the parties reserved for allowance assets theretofore 'bona fide disposed of' by the agent. The credit for salary, however, is neither justly charged to the property thus withheld, nor within the fair meaning of the stipulation and whatever may have been the agreement between the parties to the fraud, we are of opinion that error is well assigned for such allowance. The decree, therefore, must be corrected accordingly to adjudge recovery against the defendant, L. D. Carter, for $12,916.66 of trust fund not accounted for."

[This amount was subsequently corrected to read $7,577.04. (Rec., 13435-6.)]

"(2) The decree awards recovery against I. S. Carter for $11,454.18, as the balance of trust fund traced to his possession and reported by the master, not accounted for or paid over; and on behalf of the appellant, United States, error is assigned for insufficiency of this award, upon various credits allowed by the master and approved by the trial court, for expenses and salary. As the sum of $6,750 was allowed to this defendant by way of salary, the credit accordingly was erroneous, under the above stated view in reference to like allowance in favor of L. D. Carter; but the other objections are overruled, as within the doctrine there stated in respect of the findings of fact. The decree, therefore, must be corrected to make this deficiency award $18,204.18." (Rec., 13429-30-31.)

The following Statement shows in sequence the finding of the Master, the Decree of the Circuit Court and the modification thereof by the Circuit Court of Appeals.

	Master's Report (Rec. p. 5070).	Master's Amended Report (Rec. p. 5071).	Circuit Court Decree, March 21, 1908 (Rec., p. 394).	Circuit Court of Appeals, March 18, 1909 (Rec. pp. 13430-1).
L. D. & I. S. Carter.	SHORT: on Paul, Westcott and Bragg Securities $9,343.15. OVER: $21,529.15 from other sources.	Made up by 10 Ky. C. Bonds (see note).	No provisions.	No provisions.
I. S. Carter.	SHORT: 1 Mich. Tel. Bond and 1 Ky. C. Bond, both claimed personally, and $11,454.18.		The two bonds having been turned over; deficiency decree for $11,454.18.	Deficiency decree $18,204.18 of which $6750 was claim for salary, disallowed.
L. D. Carter.	SHORT: 21 Ky. C. Bonds (Value $20,884.35) and $15,544.73.		Ten of these turned over to make up Paul, Westcott and Bragg deficiency; and also remaining eleven turned over; no deficiency decree.	Deficiency decree $12,916.66, being salary claim disallowed. AMENDED to read $7,577.04 by supplemental order (Rec. p. 13435).

NOTE.—The two deficiency decrees of Circuit Court of Appeals (I. S. Carter, $18,204.18, and L. D. Carter, $7,577.04) aggregate $25,781.22. But these two parties turned over in addition to Paul, Westcott & Bragg securities $21,529.15; so that apparent total shortage under Stipulation of November 6, 1901, to turn over "substantially all" of Paul, Westcott & Bragg securities is $4,252.07. But the Government concedes that a claim of $3,450 for salary is just (Rec., 320-1). So that, according to the Government's admission, the amount unaccounted for is only $802.07.

ASSIGNMENT OF ERRORS.

By L. D. Carter.

(1)

That the court in and by its final decrees of March 18, 1909, having held that the testimony of Robert F. Westcott (which is not a part of the record in this cause and which was taken in a proceeding to which no one of the Carters was a party and when no one of or for them was present) was not admissible against Oberlin M. Carter, but was "reserved for later consideration by way of notice to the defendants I. S. Carter and L. D. Carter" (Rec., 13425), committed error in giving any weight whatever to the testimony of Robert F. Westcott, for the following reasons:

(a) Westcott, as a witness called by the United States, said on the witness stand: "I am perfectly willing to state anything if you don't make me responsible for what I say." (Rec., 11717.)

Westcott was not made responsible either for what he said or for his partnership with Greene & Gaynor.

While the record is conclusive that Westcott received money from Greene & Gaynor, presumably on account of contract work, yet he was not indicted with them, nor was he proceeded against publicly in any way.

(b) Westcott testified in effect that he was a mere cat's paw for Carter.

The Circuit Court found that Westcott was a partner with Greene & Gaynor on his own behalf (Rec., 387), and this finding was not disturbed by the Circuit Court of Appeals.

Hence, Westcott's testimony that he was a cat's-paw for Carter was false.

(c) Westcott testified in effect that the bonds given by him to Carter in October, 1897, were received by him (Westcott) a few days before from Greene, who stated they were Carter's bonds, and that up to that time he (Westcott) knew nothing about those bonds. (Rec., 11257; 11686.) On the trial this testimony was proven to be *perjury* (Rec., 7430-32), as Westcott himself bought and paid for those bonds years before 1897.

(d) While Westcott "remembered" almost every detail when examined for the complainant, he pretended and testified on cross-examination that he could not even remember his daughter's name (Rec., 11455), nor could he remember any one of numerous financial transactions some of them as large as $100,000. (Rec., 11549; 11555.)

(e) Westcott testified about his attorney: "A. Why, Hamilton never was my attorney." (Rec., 11768.)

But Mr. Hamilton testified that he had known Westcott "from about 1891 to the time of his death," and that he "was his legal adviser for a great part of that period." (Rec., 4683.)

(f) Westcott testified concerning his bond broker: "Q. And can you state that you did tell Mr. Flagg that you had given Carter full power of attorney to transact all business? A. No, sir; I did not." (Rec., 11716.)

But Mr. Flagg testified: "A. Mr. Westcott came to us at the outset and introduced Captain Carter, saying he was his son-in-law in whom he had implicit confidence, and that he had given him full power of attorney to transact all his business, and that we were to recognize him in his stead and do any business for his account that Captain Carter said." (Rec., 2380.)

(g) At certain dates it was important for complainant's purposes that Westcott's books of account should show certain transactions.

Those books of account have been tampered with and mutilated so that large numbers of stubs of Westcott's checks are missing, and stubs are in their place which are not the original stubs, and on some stubs are false entries in Westcott's handwriting which have been placed there since the court-martial. (Rec., 7439-7547.)

(2)

Before the complainant made any claim to the securities in the possession of Oberlin M. Carter, L. D. Carter and I. S. Carter acted as his agents, received and disbursed for him certain moneys, and accounted to him for what they had done, which accounting was approved by him.

When the complainant made claim to the securities of Oberlin M. Carter, a stipulation was entered into on November 6, 1901, between O. M. Carter, L. D. Carter and I. S. Carter on the one part, and the complainant on the other part, in which stipulation it was agreed that no one of the Carters should be held responsible for what he had paid out *bona fide* prior to that date, but that on the other hand the three Carters would at once turn over to the receiver what had not been "*bona fide* disposed of by them and therefore beyond their control." (Rec., 13419.)

The court, therefore, in and by its final decrees of March 18, 1909, committed error:

(a) In requiring an equitable accounting from L. D. Carter as trustee for the complainant, when the reference was limited simply to an ascertainment of whether he had complied with the stipulation of November 6, 1901.

(b) In disregarding the accounting made by

L. D. Carter to O. M. Carter for whom he acted as agent.

(c) In disregarding the contract for salary made by L. D. Carter with O. M. Carter by whom he was employed.

(d) In requiring L. D. Carter to furnish more information than he was required to furnish under the stipulation of November 6, 1901.

(e) In finding any balance against L. D. Carter.

(f) The Circuit Court of Appeals held that L. D. Carter and I. S. Carter had not accounted fully for $25,781.22 as required by paragraph 2 of the stipulation of November 6, 1901, and entered decrees against them for that amount. (Rec., 13431; 13436.)

This was error, as both the Circuit Court and the Circuit Court of Appeals hold that O. M. Carter, who was a joint obligor with L. D. Carter and I. S. Carter in said stipulation of November 6, 1901, turned over $34,600 of his own money to the receiver. (Rec., 390.) This $34,600 more than offset said $25,781.22; and hence, as between them all, more was turned over than the stipulation required."

The assignments by I. S. Carter are the same as those for L. D. Carter with the following additional assignment:

(3)

"That the court in and by its final decrees of March 18, 1909, committed error in holding that the two bonds (1 Michigan Telephone and 1 Kentucky Central) claimed by I. S. Carter were purchased with the proceeds of a trust fund belonging to the complainant."

BRIEF OF ARGUMENT.

The complainant in this case is not entitled to a deficiency decree, for the bill and prayers are not so framed, but are for a decree awarding the complainant *specific property and securities.* And even admitting that the bill and relief sought entitle the complainant to a decree for a deficiency, the right thereto was expressly waived by the terms of the stipulation of November 6, 1901, as by that agreement the defendants were to turn over only the property and securities not *bona fide* disposed of.

The deficiency decrees represent what was *bona fide* disposed of.

These decrees arise by reason of the application of the strict rules of accounting by the master and the Circuit Court of Appeals. The complainant under the contract of November 6, 1901, was not entitled to an accounting, as such, but could claim from the defendants only an enumeration of what was in their hands at the date of the stipulation and a report or statement of what had been *bona fide* disposed of, the report or statement to be only with such definiteness or precision as the defendants could give. This follows, for, in respect to the disposition of securities, the stipulation provided simply that the defendants should "give all the information they can." This having been complied with, the complainant had no right to demand more.

But let it be assumed that the bill and prayers and the stipulation are such that the complainant

would be entitled to deficiency decrees, and further that a strict accounting is permissible (which is not true), then and in that event, complainant is not entitled to deficiency decrees, because the defendants have complied in fact with the terms of the stipulation.

The defendants were collectively to turn over the securities claimed except what had been *bona fide* disposed of, and "at least substantially all" of the Paul, Westcott and Bragg securities not already "paid out or pledged."

The deficiency decrees against L. D. Carter and I. S. Carter amount to		$25,781.22
Against this is a conceded "credit" (Rec., 320) for salary of	$3,450	
And these two defendants turned over securities not called for amounting to	$21,529.15	$24,979.15
Alleged deficit		$802.07

Hence, the amount turned over is "at least substantially all" of the Paul, Westcott and Bragg securities, the total of which amounted to $349,745.00.

The court permitted the testimony of Robert F. Westcott to be used as notice to L. D. Carter and S. Carter. This testimony is not in the record, although printed therein. Neither admitting nor denying the right to use this testimony, even in respect to notice it is entitled to no weight, as it bears inherent *indicia* of perjury. (See assignment of errors No. 1, L. D. Carter.)

ARGUMENT.

I.

The complainant is not entitled to a deficiency decree for any amount under the pleadings and the record in the case.

The theory of the complainant's case is that certain property and securities being in the possession of the defendants, and the property and securities having been purchased with the fruits of fraud practiced upon the complainant, it is entitled to said property and securities. Such is the basis of the complainant's claim and the specific prayer for relief is in harmony therewith.

(a) *The specific prayer must be in consonance with the case made in the bill; and the relief grantable under the general prayer must be in harmony with the facts in the bill and such as the proof will justify.*

Equity Rule XXI provides:

> "The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and shall also contain a prayer for general relief."

In many classes of cases in equity the general prayer will permit the granting of relief other than that specifically prayed for, but only that relief which is in harmony with the theory of the case.

> "The usual course is for the plaintiff in this part of the bill [prayers] to make a special

prayer for the particular relief to which he thinks himself entitled, and then to conclude with a prayer of general relief at the discretion of the court. The latter can never be properly and safely omitted; because if the plaintiff should mistake the relief, to which he is entitled in his special prayer, the court may yet afford him the relief, to which he has a right, under the prayer of general relief, provided it is such relief as is agreeable to the case made by the bill." Story Eq. Pl., Sec. 40, citing Mitf. Eq. Pl. by Jeremy, 38, 45; Cooper Eq. Pl., 13, 14; Barton, Suit in Eq., 40, 41 and notes; *Wilkinson* v. *Beal*, 4 Mad., 408; *Beaumont* v. *Boultree*, 5 Ves., 495; *Hiern* v. *Mill*, 13 Ves., 119, 120; *English* v. *Foxhall*, 2 Peters, 595; *Hobson* v. *McArthur*, 16 Peters, 195; *Danforth* v. *Smith*, 23 Verm., 247; *Hilliary* v. *Hurdle*, 6 Gill, 105; *Scudder* v. *Young*, 25 Maine, 153.

In *English* v. *Foxhall*, 2 Peters, 595, it is said at p. 612:

"There is no doubt but that, under the general prayer other relief may be granted than that which is particularly prayed for. But such relief must be agreeable to the case made by the bill; and there is nothing in the first bill to sustain the particular relief granted as to the deficiency."

In *Hobson* v. *McArthur*, 16 Peters, 182, 195, it is said:

"The court, under this [general] prayer will grant such relief only as the case stated in the bill and sustained by the proof, will justify. The frame and structure of the bill in this case is for a specific execution of the contract of the 10th of November, 1810, which provides only for the valuation of the lands and makes no provision for the sale of the land or the payment of

the money. And if the facts would justify a prayer for any such relief, the bill should have been framed with a double aspect; so that if the court should decide against the complainant in one view of the case, it might afford him relief in the other. But this bill is not so framed."

In Street's Federal Equity Practice, Sec. 247, it is said:

"The first and main principle to be noted, is that under the general prayer, the court may grant any relief fairly conformable with the case made in the bill (*Jones* v. *Van Doren* (1889), 130 U. S., 692). Where the special prayer is narrower than the case made in the bill, the plaintiff can have broader relief under the general prayer, if the record discloses his right to such relief (*Chicago, etc., R. Co.* v. *Macomb* (1880), 2 Fed., 18). But relief that is inconsistent with the theory of the case made in the bill or that rests on grounds not asserted in the bill cannot be granted under the general prayer. As has been well said, 'it is a great misapprehension to suppose that one cause of action can be stated in a bill in equity, and by some sort of comprehensive flexibility of chancery jurisdiction can be administered growing out of a state of facts not embraced within the facts pleaded. The rule that under the general prayer for relief a party may have any relief to which he may show himself entitled is limited to relief founded on and consistent with the facts set out in the bill, and not such as may be proven at the hearing.'" (*Newham* v. *Kenton* (1883), 70 Mo., 382, 395.)

And see *U. S.* v. *E. C. Knight Co.*, 156 U. S., 1.

In cases alleging fraud, however, if proof of fraud be wanting, the complainant is not entitled to substituted relief.

In Street's Federal Equity Practice, Sec. 252, it is said:

> "The rule that a plaintiff may, under the general prayer, have any relief fairly conformable with the case stated in the bill and proved by the evidence is not liberally applied in cases where fraud is the gravamen of the bill. In fact we may say that, by a special exception to the general rule, a plaintiff who bases his bill primarily on charges of fraud and who prays for special relief in respect to the fraudulent conduct of which he complains cannot, when the fraud is disproved, fall back on the general prayer and obtain relief he might otherwise be entitled to receive. The courts are very averse from permitting a bill based on charges of actual fraud to be sustained on any other ground. *Fisher* v. *Boody* (1852), 1 Curt. C. C., 206; *Wilde* v. *Gibson* (1848), 1 H. L. Cas., 626; *Price* v. *Berrington* (1851), 7 Eng. Law & Eq., 254.) A reasonable regard for the rights and reputation of the defendant who is charged with the fraud seems to be at the basis of this rule. The attitude of the courts on this point has been well expressed by Goff, J., in a case where the allegations of fraud were ill considered and out of place. Said he: 'The charges of fraud have been made either under an entire misconception of the facts or with a recklessness that, at least, is not commendable, and should not be encouraged by an endeavor on the part of this court to relieve the complainants of the embarrassment caused thereby by holding that they are entitled to a decree founded on some general ground of equity jurisdiction, not specially pleaded, but supposed to be included in the prayer for general relief. While equity will always relieve those who suffer from acts of fraud, it has also always required that those who seek its juris-

diction on that account shall, after having carefully scrutinized the cause of complaint, most clearly formulate the allegations of the same, and then that they shall fully prove that which they have so alleged.' " (*Dashiell* v. *Grosvenor* (1895), 66 Fed., 334, 339.)

In *Eyre* v. *Potter*, 15 How., 42, Mr. Justice Daniel said:

> "Although cases of constructive fraud are equally cognizable, by a court of equity, with cases of direct or positive fraud, yet the two classes of cases would be met by a defendant in a very different manner. * * * When the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree, by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated."

Even in cases where the general prayer is sufficient,

> "the special relief prayed at the bar must essentially depend upon the proper frame and structure of the bill; for the court will grant such relief only, as the case stated will justify; and will not ordinarily be so indulgent, as to permit a bill framed for one purpose to answer another, especially if the defendant may be surprised or prejudiced thereby." Story Eq. Plead., Sec. 38; Cooper Eq. Pl., 14; *Jones* v. *Parishes of Montgomery, etc.*, 3 Swanst., 208; *Legal* v. *Miller*, 2 Ves., 299; *Lord Walpole* v. *Lord Orford*, 3 Ves., 416; *Hiern* v. *Mill*, 13 Ves., 119; 3 Wooddes Lect. 55, p. 372; *Walker* v. *Devereaux*, 4 Paige, 229; *Scudder* v. *Young*, 25 Maine, 153.

The theory of this case is the same as one for the recovery of an ancient silver altar claimed as treasure trove, for a cabinet of family jewels; for a picture or statue of a particular artist; and for other objects of a like kind. See Adams' Equity, p. 91, and Mitf., 117; *Duke of Somerset* v. *Cookson*, 3 P. W., 389; *Earl of Macclesfield* v. *Davis*, 3 Ves. & B., 16; *Wood* v. *Rowcliffe*, 3 Hare, 304.

The specific prayer in the present case is thoroughly in harmony with the allegations of the bill. It asks

> "that the court will in due course, by its final decree declare all of the aforesaid investments within the jurisdiction of the court, * * * are properties held in trust for orators and will decree a delivery of the same or proceeds thereof to your orators."

The aforesaid investments are as follows:

Securities turned over to O. M. Carter by R. F. Westcott, October, 1897:

Par value	$285,000.00
Eighth avenue property	39,763.75
Gordon note	10,000.00
Orange, N. J., property	63,020.35
Mortgage 8th avenue	23,000.00
	$420,784.10

The claim in the bill is modified by the stipulation of November 6, 1901, and particularly by paragraphs "2" and "9" thereof. The former provides for turning over of assets which have "not heretofore been *bona fide* disposed of," the latter for turning over "substantially all" of the Paul, Westcott

and Bragg securities, not heretofore "bona fide paid out or pledged."

Prior to the stipulation of November 6, 1901, the claim of the complainant was the specific property, real and personal, above set forth.

By virtue of the stipulation, the claim of the government was reduced by the amounts *bona fide* disposed of.

(b) *The decree must conform to the prayers of the bill.*

In *Phipps* v. *Sedgwick*, 95 U. S., 3, a partner had transferred to his wife considerable amount of money, being about one-third of the capital of the partnership, thereby placing it beyond the reach of his creditors. There was a decree for the payment of money against the executors of the wife on account of particular property.

Miller, J., said:

> "But we are of opinion that Mrs. Place, if living, could not be subjected to such a decree, if all that is said be true; nor can her executors be now.
>
> While the books of reports are full of cases in which real or personal property conveyed to the wife in fraud of her husband's creditors has been pursued, and when identified in her hands, or in the hands of voluntary grantees or purchasers with notice, we are not aware of any well considered case of high authority where the pursuit of the property has been abandoned, and a judgment *in personam* for its value taken against the wife.
>
> Certainly no such doctrine is sanctioned by the common law; and, though the present suit is a bill in chancery, the *decree* in this case is

nothing more than a judgment at law, and could as well have been maintained in a separate suit at law for the money as in this suit. And the liability of the executors of the wife to this personal judgment must depend on the same principle as if abandoning the pursuit of the *res,* the assignee had brought an action at law for the money."

And in *Clark* v. *Beecher,* 154 U. S., 631, Swayne, J., said:

"It is equally clear that the personal decree against the appellant for the rents, issues and profits, and the use and occupation of the premises was erroneous."

In *Hayward* v. *Eliot National Bank,* 96 U. S., 611, where a pledgor filed a bill to recover specific stock alleged to have been fraudulently sold by the pledgee, it was said:

"The specific relief sought is a decree requiring the bank to transfer the stock to him (plaintiff)—a thing now beyond its power to do. It is true that the bill contains a general prayer for such relief as may be consistent with equity and good conscience; but we incline to the opinion that its whole frame and structure are inconsistent with a right in this action to a decree for the value of the stock, even if the facts justified any such relief. 1 Dan. Ch. Pr., 3d Am. Ed., 382; *Chalmers* v. *Chambers,* 6 Har. & J., 29; *Hobson* v. *McArthur,* 16 Pet., 182; *English* v. *Foxhall,* 2 Pet., 595; *Thompson* v. *Smithson,* 7 Port., 144; *Driver* v. *Fortner,* 5 Port., 10; *Strange* v. *Watson,* 11 Ala., 324."

In the present case, the decree did not conform to the prayers of the bill, as it awarded to the complainant relief other than that prayed for, either specifically or generally, to wit, money other than

that claimed, by means of deficiency money decrees against L. D. Carter for $7,577.04 and against I. S. Carter for $18,204.18.

The bill herein sought to have decreed to the complainant certain property and securities in *specie*, and the prayers asked for such relief. It is true, that the prayers asked for the "aforesaid investments," but nothing more. There is no alternative relief sought, as there might well have been.

Prayers for alternative relief are permissible.
Story Eq. Pl., Sec. 8, 42a and 42b.

In *Hardin* v. *Boyd*, 113 U. S., 756, Mr. Justice Harlan said that "it is a well settled rule that the complainant, if not certain as to the specific relief to which he is entitled, may frame his prayer in the alternative, so that if one kind of relief is denied another may be granted; the relief of each kind being consistent with the case made by the bill" and cited *Terry* v. *Rosewell*, 32 Ark., 492; *Colton* v. *Ross*, 2 Paige, 396; *Lloyd* v. *Brewster*, 4 id., 540; *Lingan* v. *Henderson*, 1 Bland, 252; *Murphy* v. *Clark*, 1 Sm. & M., 236. And the prayer for alternative relief may be by amendment.

In *Hubbard* v. *Urton*, 67 Fed., 419, a bill to recover certain shares of mining stock, alleged to have been fraudulently obtained, or the value thereof, with alternative prayers was on demurrer sustained.

In this case there is no alternative prayer for relief in the event the "aforesaid investments" have been dissipated, or lost, or sold, or otherwise disposed of. The bill is confined to a recovery of spe-

cific property *in specie;* the relief asked for by the prayers is to the same effect.

The theory of a case, when once made must be pursued to the end of the litigation; one cannot shift his ground, save upon the penalty of being non-suited.

Had there been proof and hearing without the stipulation of November 6, 1901, these defendants might possibly have been liable for the money value of such property and securities as had been (after notice of the complainant's claim) dissipated or squandered or other than *bona fide* disposed of. But by the very terms of the stipulation itself these defendants were discharged from any obligation to turn over to the receiver any securities or the value thereof which had been expended or pledged in good faith.

The complainant elected by the stipulation to have in the possession of the receiver of the court the *then* holdings of the defendants, and to forego any attempt to secure a decree awarding money.

The securities were in the possession of the defendants; the complainant wanted them in the hands of a court officer. What the motives were which prompted this desire are not shown, but it can easily be seen that there was a consideration moving to the complainant, to wit, the safe keeping of the securities. Having elected to pursue the property and securities *in specie* it cannot now claim any other thing than the property and securities.

(c) *The decree must conform to the pleadings; the relief granted must always be in conformity with the case made in the pleadings.*

In *Simms* v. *Guthrie*, 9 Cranch., Marshall, C. J., said:

> "It is certainly a correct principle that the court cannot decree to any plaintiff, whatever he may prove, more than he claims in his bill."

In *Crockett* v. *Lee*, 7 Wheat., 523, Marshall, C. J., said:

> "No rule is better settled than that the decree must conform to the allegations, as well as to the proofs in the cause."

In *Carneal* v. *Banks*, 10 Wheat., 181, Marshall, C. J., said:

> "The maxim, that a decree must be sustained by the allegation of the parties, as well as by the proofs in the cause, is too well established to be disregarded."

In *Harding* v. *Handy*, 11 Wheat., 103, it was held that the decree was not supported by the allegations of the bill because the bill sought to set up a parol trust which was denied in the answer, and the decree was founded upon a supposed incompetency of a party to convey his property.

The complainant cannot ask for relief in this case by relying upon the general prayer. The theory of the case is that the complainant was defrauded by means of a conspiracy, and the principle, that if one fails to make out a case on which the special relief prayed for will be granted, he may under the general prayer secure relief, is subject to the exception that in cases alleging fraud the complainant cannot, upon failing to prove fraud, fall back upon the general prayer and obtain other relief.

In *Brittan* v. *Brewster*, 2 Fed., 160, fraud was alleged as the basis of recovery and the complainant

having failed to prove fraud it was held that he was entitled to no relief in that suit.

In *Kent* v. *Lake Superior Ship Canal R. & I. Co.*, 144 U. S., 75, suit was brought by a holder of bonds who charged a fraudulent conspiracy naming other bondholders, the purpose of which was alleged to be to obtain possession of the mortgaged property by the device of receiver certificates and by selling the property in foreclosure and buying it in with the receiver's certificates. The bill prayed that the sale of the property be set aside and that a portion of the mortgaged property be held subject to the plaintiff's lien. It was contended that under the general prayer the complainant was entitled to a decree permitting him to share in the benefits of the purchase but it was held "that such relief would not be conformable to the case made by the bill."

In *Hendryx* v. *Perkins*, 114 Fed., 801, a bill was brought to set aside a decree upon charges of fraud and trickery. These charges were not sustained and it was held that the plaintiff could not get relief on the ground that the decree was due to a mutual mistake. The court said:

> "A party who charges fraud assumes a grave responsibility by reason of making injurious allegations, which he cannot escape by substituting another issue in lieu thereof. The only exceptions have been in some instances where the bill had a double aspect, so that, therefore, it might be sustained according to its other allegations, even if those charging fraud were not proven. In such cases the proper practice is to expressly dismiss the bill so far as fraud is concerned."

Enough has been said to show that the decree entered by the Circuit Court on March 18, 1908, was

not in accord with the allegations of the bill, was not in conformity with the proof, was not in harmony with the relief prayed for, and was not proper under the rights of the litigants as defined by the stipulation of November 6, 1901.

II.

The complainant in this case was not entitled to an accounting as such from the defendants because:

(a) The bill is not framed upon such a theory as will justify an accounting;

(b) The prayers of the bill did not ask such relief;

(c) There was no reference to a master for an accounting generally but only particularly as hereafter stated;

(d) *The right to general accounting was expressly waived by the complainant in the stipulation of November* 6, 1901.

The only accounting to which the complainant had a right was in respect to property or securities *bona fide* disposed of or pledged; the measure of that accounting was simply that the defendants should "give all the information they can." Therefore the accounting was not the usual equitable accounting as from an agent or trustee, but simply an enumeration of what was in the hands of the defendants and an honest and truthful report or statement of what had been *bona fide* disposed of, with only such definiteness and precision as the parties could give. To require more than this violated the spirit as well as the letter of the agreement.

III.

But assuming, simply for the purpose of the argument, that there is harmony (a) between the allegations of the bill, (b) the relief prayed, (c) the proof in the main case and (d) the decree, nevertheless the government is not entitled *on the facts* to a deficiency decree against any of the defendants.

By virtue of the opinion of the Circuit Court of Appeals there is due to the complainant for deficiencies as follows:

L. D. Carter, $7,577.04 (a deficiency decree was denied by Circuit Court).

I. S. Carter, $18,204.18 (deficiency decree by Circuit Court for $11,454.18).

Recurring to those things which these defendants were to do (in respect to securities and property) under the stipulation of November 6, 1901 (Rec., 191); and first as to paragraph (2) of the stipulation:

> "(2) That as to the assets claimed by the Government as assets into which it charges the funds intrusted to Oberlin M. Carter as disbursing officer was diverted, with the proceeds, income and reinvestments thereof where the form of the investments have been changed, and which assets have or may be hereafter traced into the possession, custody or control of said defendants, and have not heretofore been *bona fide* disposed of by them and therefore beyond their control, shall be forthwith by the said defendants turned over to the receiver appointed in this cause."

That is to say, the three defendants should turn over the funds and proceeds, income and reinvest-

ments thereof, *except* what had been *bona fide* disposed of.

The defendants, as has been seen, turned over to the receiver all of the property and securities embraced in this paragraph of the stipulation save $802.07, even under the strict rules of equity accounting; and such accounting was expressly waived by the stipulation.

Under paragraph (9) the defendants were under an obligation to

> "turn over to the receiver at least substantially all of the assets turned over to I. Stanton Carter, and L. D. Carter, by J. H. Paul and R. E. Westcott and James Bragg, or their proceeds and reinvestments, except such as had been, prior to the receivership, *bona fide* paid out or pledged by them for attorneys' fees or as expenses in defense of Carter, or expended by them legitimately in the handling of said properties, or which has not already been taken possession of by receivers in this cause."

Whether or not this paragraph was complied with admits of no doubt, although it has recently been claimed ("*In the Matter of United States, Petitioner,* Original No. 10, October Term, A. D. 1909") that I. Stanton Carter and L. D. Carter did not turn over substantially all of these securities.

In respect to the property and securities the stipulation had further express condition, applicable to both paragraph (2) and paragraph (9) of the stipulation. It reads (par. 3):

> "The said defendants shall waive their privilege and give all the information they can with regard to what property has been disposed of and its disposition."

There is no claim that the defendants failed to comply with this condition.

Nearly two years after the defendants had turned over to the receiver the property and securities embraced in paragraph (2) and (9) and had rendered an account of the moneys expended by them in the defense of Carter, and in the handling of said properties, there was at the request of the complainant (Rec., 148) a reference to the master (Rec., 148), who was to report:

> (a) "Whether any assets remain to be accounted for or turned over by the defendants under the stipulation of November 6, 1901."
>
> (b) "Whether Lorenzo D. Carter and I. Stanton Carter have turned over to the receiver 'substantially all of the assets' turned over to them by Paul, Westcott and Bragg, 'or their proceeds and reinvestments except such as has been prior to the receivership *bona fide* paid out,' etc. And if any assets had not been turned over, or properly accounted for, then to report what has not been so accounted for."
>
> (c) "That if I. S. Carter and L. D. Carter had not already turned over or accounted for such assets, that the master should before reporting his findings afford them an opportunity to appear and properly account."

Pursuant to the instruction, the master advised counsel of his findings: the Carters, according to these findings, had not accounted for $9,343.15 of the Paul, Westcott and Bragg securities. (Rec., 5070.) This was made up on March 13, 1903 (Rec., 151), and the master then reports (April 15, 1903) that he "finds that all of the receipts from said Paul, Bragg and Westcott are accounted for by said defendants in accordance with the contract of

November 6, 1901." (Rec., 5071.) And the master also found that the Carters had turned over $21,529.15 from other sources.

Error was alleged in that the master held the defendants to a strict accounting, when by the terms of the stipulation they were only "to give all the information they can."

It is submitted that the master should not have held the defendants to the strict rules of accounting, because that was in direct violation of the terms of the stipulation.

L. D. Carter and I. S. Carter had been the agents of Oberlin M. Carter and had accounted to him for their management and handling of the property. This accounting was satisfactory to him.

The complainant, before the stipulation of November 6, 1901, may possibly have had a right to compel L. D. Carter and I. S. Carter to account according to the rules applicable to that remedy; but after the stipulation the only right which the government had, as far as an accounting was concerned, was to compel the defendants to "give all the information they can" concerning the expenditures. When the information had been given,—and there is no claim that it was not given,—the right of the government in this behalf ceased. Nevertheless, the master held them to a strict accounting, and thus denied them for credits for which they were entitled under the contract of November 6, 1901.

The stipulation of November 6, 1901, did not require the defendants in the trial court to turn over to the receiver *all* of what remained of the prop-

erty formerly in the hands of Paul, Westcott and Bragg, but only "substantially all" of it.

It is submitted that the alleged deficit of $802.01 (as shown in the statement of the case) is within the meaning of "substantially all," when the securities involved amount at par value to $349,745.00.

IV.

The right of the complainant below to a deficiency decree against the defendants, if any it had, is the same as to each.

Under the stipulation the defendants were to turn over (a) certain assets, which had not theretofore been *bona fide* disposed of (par. 2) and (b) "substantially all" of the Paul, Westcott and Bragg securities which had not been *bona fide* disposed of or pledged (par. (9)). There was no distinction as between the defendants, each was and is under the same obligation.

V.

The present deficiency decrees against L. D. Carter and I. S. Carter are predicated in part upon the testimony of Robert F. Westcott in the Gaynor-Greene removal proceedings before Shields, Commissioner.

This testimony, assuming that it may be used to give notice to the two defendants (which is denied), is not entitled to any weight for the reason that it is discredited by numerous false statements that were

palpably made for the purpose of misleading. Several instances,—enough, it is submitted, to discredit every word of the testimony,—follow:

(1) Westcott, as a witness called by the complainant, admitted on the witness stand: "I am perfectly willing to state anything if you don't make me responsible for what I say." (Rec., 11717.)

Westcott was not made responsible either for what he said or for his partnership with Greene & Gaynor.

While the record is conclusive that all the money paid out by Greene & Gaynor was received or handled by Westcott, he was not indicted with them, nor was he prosecuted publicly in any way.

(2) Westcott testified in effect that he was a mere cat's-paw for Carter.

The Circuit Court found that Westcott was a partner with Greene & Gaynor on his own behalf (Rec., 387), and this finding was not disturbed by the Circuit Court of Appeals.

Hence, Westcott's testimony that he was a cat's-paw for Carter was false.

(3) Westcott testified in effect that the bonds given by him to Carter in October, 1897, were received by him (Westcott) a few days before from Greene, who stated they were Carter's bonds, and that up to that time he (Westcott) knew nothing about those bonds. (Rec., 11257; 11686.) On the trial this testimony was proven to be *perjury* (Rec., 7430-32), as Westcott himself bought and paid for those bonds years before 1897.

(4) While Westcott "remembered" almost every detail when examined for the complainant, he could

not even remember his daughter's name on cross-examination (Rec., 11455), nor could he remember what he did with amounts of money as large as $100,000. (Rec., 11549; 11555.)

(5) Westcott testified about his attorney: "A. Why, Hamilton never was my attorney." (Rec., 11768.)

But Mr. Hamilton testified that he had known Westcott "from about 1891 to the time of his death," and that he "was his legal adviser for a great part of that period." (Rec., 4683.)

(6) Westcott testified concerning his bond broker: "Q. And can you state that you did not tell Mr. Flagg that you had given Carter full power of attorney to transact all business? A. No, sir; I did not." (Rec., 11716.)

But Mr. Flagg testified: "A. Mr. Westcott came to us at the outset and introduced Captain Carter, saying he was his son-in-law in whom he had implicit confidence, and that he had given him full power of attorney to transact all his business, and that we were to recognize him in his stead and do any business for his account that Captain Carter said." (Rec., 2380.)

VI.

The contract of November 6, 1901, expressly exempted the Carters from turning over anything which had been *bona fide* disposed of or pledged. The complainant in writing conceded that payments for salary were proper under that contract (Rec.,

320-21), yet the Circuit Court of Appeals holds that "the credit for salary, however, is neither justly charged to the property thus withheld, nor within the fair meaning of the stipulation." (Rec., 13431.) It is submitted that the court cannot construe a contract in favor of one of the parties thereto when said party admits it should not be so construed; and as the salaries to L. D. Carter and I. S. Carter were "*bona fide* paid out" by them "as expenses in defense of Carter," and in "the handling of said properties," it is submitted that under the contract of November 6, 1901, the court had no power to disallow them, as the complainant admits the contract expressly contemplated they should be paid.

In conclusion, respecting the deficiency decrees, it is respectfully submitted that the complainant below is not entitled in this case, under the pleadings and prayers for relief, to any deficiency decree whatever; and, if the theory of the case, as so made, permits the entry of a deficiency decree, then the stipulation of November 6, 1901, denied such right to the complainant; and further, if the theory of the case and the stipulation of November 6, 1901, taken together be such that a deficiency decree might be entered, then still none should be granted for the reason that there is in fact no deficiency, all property and securities having been turned over to the receiver of the trial court.

Respectfully submitted,

JOHN B. DAISH,
Solicitor for L. D. Carter and I. S. Carter.

December 17, 1909.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

No. 552.

OBERLIN M. CARTER ET AL., CROSS-APPELLANTS,

vs.

UNITED STATES OF AMERICA, CROSS-APPELLEE.

CONDENSED BRIEF OF MR. J. B. FORAKER.

STATEMENT OF THE CASE.

These are suits in equity to recover specific property alleged to have been purchased from one-third of the profits of contractors known as Greene & Gaynor in performing certain contracts with the United States.

Those contracts were all in writing and were let by the Chief of Engineers through the defendant Oberlin M. Carter, at public bidding, and the performance of said contracts was under the supervision of said Carter.

The bill alleges there was fraud in letting the contracts, resulting in the prices paid thereunder being too high; and fraud in performing the contracts, resulting in loss and damage to the United States.

The bill alleges that said frauds were participated in by said Carter and that in consideration thereof he received one-third of the profits made by Greene & Gaynor under said contracts.

The questions at issue are as follows:

1. The Circuit Court of Appeals in the opening part of its opinion (Rec., 13422) states that the main issue in this case ("the basic averments of the bill") is as to alleged

> "great losses suffered by the United States, through payments made to the contractors, Greene & Gaynor, of prices for their work, (furnished under successive contracts) grossly in excess of value."

Later on that court says the alleged "$2,000,000" of fraudulent "overpayments" was in the prices paid for "brush mattresses." (Rec., 13427.)

2. Other questions are injected into this case by stipulation of the parties, *i. e.,* questions arising under a stipulation or contract dated November 6, 1901.

ERRORS RELIED UPON.

The Circuit Court of Appeals erred in holding as follows:

1. That the contractors should have been paid only the actual cost to them of "brush mattresses," based on what they paid for labor, *i. e.,* 25 cents per day; and that it was "a raid upon the government" to pay the contractors the market value of said mattresses as fixed by honest public bidding according to law, based on the prevailing price of labor at $1.50 per day.

2. That the alleged profits which Robert F. Westcott may have received as a secret partner with Greene & Gaynor, which Westcott gave to Carter (his son-in-law) in October, 1897, can be recovered by the complainant.

3. In basing its decree on an alleged connivance instead of on the conspiracy charged in the bill of complaint.

4. That Carter is liable under the stipulation of November 6, 1901, for attorneys' fees, etc., paid by him prior to that date.

BRIEF OF ARGUMENT.

A.

Every finding of fact by the Circuit Court was in Carter's favor.

Every finding of fact by the Circuit Court was affirmed by the Circuit Court of Appeals.

The Circuit Court held concerning the entire work under the "big contract" of 1892, which that Court says is "typical of all the contracts," and which the Circuit Court of Appeals says is "the main subject of controversy," as follows:

> "The work was performed by Carter, within the appropriation, in such a manner as to secure an increase in depth of the channel of Savannah River, two hundred forty feet in width at bottom, from Savannah to the ocean, of nine feet, whereby that city became the second city on the Atlantic Coast in the volume of its commerce. This end had long been sought for without avail. The government engineers, almost with one accord, pronounce the work a triumph of engineering skill." (Rec., 359.)

The Circuit Court of Appeals in affirming that finding, says that it was

"a great work in the improvement of harbors." (Rec., 13423.)

The Circuit Court of Appeals "summarized" the entire "main opinion" of the Circuit Court (Rec., 13409-18), and after affirming all the findings of fact made by that court, the Circuit Court of Appeals made one new additional finding on which it based its decree. The Circuit Court of Appeals held as follows:

> "We concur, therefore, in the opinion filed by the trial judge, that the charge of conspiracy between Captain Carter and the contractors to defraud the United States, under the contracts referred to, is: (a) neither established by direct evidence, (b) nor can such charge be upheld under the testimony alone of methods adopted in making specifications, advertising for bids, treatment of proposed bidders, or letting contracts, (c) nor under one or the other several branches of testimony reviewed in the opinion, considered *independently of the entire chain of circumstances.*" (Rec., 13425.)

The "chain of circumstances" which the Circuit Court of Appeals then says upsets all the findings made in Carter's favor, is as follows:

(a) The assumption that by the time Carter had used 350,000 square yards of brush mattresses under the big contract of 1892, *i. e.*, in October, 1893, he "must have discovered" that Greene & Gaynor were making "exorbitant" profits and that Robert F. Westcott was receiving one-third thereof.

(b) The fact that four years thereafter, *i. e.*, in October, 1897, Westcott gave a large part of the proceeds thereof to Carter.

(c) The fact that after October, 1893, Carter permitted the contractors to complete the "big contract" of 1892 at the contract price for brush mattresses.

(d) The said new additional finding that Carter let further contracts to Greene & Gaynor at similar prices after October, 1893, and received certain securities and property from Westcott in October, 1897, as aforesaid.

In making that new finding the court overlooked the important fact that only one contract, and that an insignificant one, was ever let after October, 1893, at the prices complained of, except the two large contracts of 1896, from which 1896 contracts both the Circuit Court and the Circuit Court of Appeals held that neither Carter nor Westcott ever derived any benefit whatever. See *post*, p. 18-19.

As to Carter's connection with any of the contracts, the Circuit Court found from the deposits, checks, deposit slips, etc., of Robert F. Westcott, that Westcott was a secret partner with Greene & Gaynor in some of their contracts, but not in those of 1896 (Rec., 387), but refused to find that the evidence, which it says is "entirely circumstantial," showed that Carter had anything to do therewith; and held specifically with regard to much of that "circumstantial"

evidence for complainant, that it consisted of statements, etc., which are based on "forced balances" and "strained conclusions."

The Circuit Court of Appeals held that Carter had nothing to do with Westcott's partnership with Greene & Gaynor, or their divisions of profits with Westcott, saying:

> "It does not appear, however, that Carter took part in or was present at any of the divisions referred to between the contractors and Westcott; nor is there any direct evidence that he was informed thereof, or was mentioned or intended in such transactions to be the beneficiary." (Rec., 13425.)

B.

This leaves nothing but circumstantial evidence against Carter, which the Circuit Court of Appeals summarizes as follows:

> "The fact alone of successive contracts thus let to these contractors, at prices far beyond the reasonable value of brush mattresses whereby the United States was plainly defrauded in overpayments approximating $2,000,000—without proof of tenable excuse for the letting through emergency or other cause—*implies* either participation in benefits or collusion on the part of the officer having direction of the work." (Rec., 13427.)

This claim that the United States was "defrauded" out of "$2,000,000" has been repeated so often that the Circuit Court of Appeals must have adopted it without proper investigation of the record.

In the first place, the findings of both courts show there is nothing in controversy but "brush mattresses," and all the "brush mattresses" for which Greene & Gaynor ever were paid are as follows:

	Square Yards.	*Amount Paid.*
Contract 4572, in 1891	61,529	$ 59,683.13
4637, in 1891	7,744	7,666.56
4655, in 1891	none	none
4820, in 1892	107,735	113,121.75
4960, in 1892	1,363,572	1,285,393.40
4963, in 1892	none	none
5127, in 1892	none	none
5133, in 1892	none	none
5253, in 1893 (March)	17,171	16,999.29
5254, in 1893 (March)	none	none
5811, in 1894	213,334	121,600.38
6049, in 1895	13,898	13,898.00
6515, in 1896 (Oct. 8)	218,320	177,663.60
6517, in 1896 (Oct. 8)	346,288	342,825.12
Total	2,349,591	$2,138,851.23

It thus appears that Greene & Gaynor received altogether under all the contracts in controversy a total of only $2,138,851.23 for "brush mattresses."

The Circuit Court of Appeals says there was an "overpayment" on said "brush mattresses" of "$2,000,000"; or, in other words, that said mattresses should have been bought for $2,138,851.23, *less* $2,000,000.00, *i. e.*, for $138,851.23.

The total number of yards bought being 2,349,591 and the finding of the Circuit Court of Appeals being that the total cost thereof should have been only $138,851.23, that is a finding that those "brush mattresses" should have cost only 6 *cents* per square yard, placed in the work.

But what is the evidence in this case as to the "reasonable value" of said "brush mattresses"?

(a) Evidence that the contractors made abnormal profits by a "raid," *not* on the government, but on their laborers. (Ref., 52 *et seq.*)

(b) Evidence that the contracts were honestly let at public bidding according to law at the usual market prices for such brush mattresses, and that "the contractors used more material" per square yard of mattress paid for than the contracts required. (Rec., 378.)

(c) The complainant's witnesses testify that Greene & Gaynor paid 16 2/3 cents per day and board for their labor. (Rec., 1993.) A very large part of the cost of brush mattresses was for labor; and the complainant's witnesses, reckoning labor at 25 cents per day (16 2/3 cents and board), which is what Greene & Gaynor paid, "estimate" the cost of said brush mattresses to Greene & Gaynor at about one-sixth of what defendant's witnesses testify was the market value thereof based on labor at the prevailing rate of $1.50 per day. (Labor, $1.50 per day, Rec., 806; 2561.)

So that the evidence may be said to be undisputed that the market value of the brush mattresses in controversy was about six times what complainant's witnesses "estimate" was the actual cost thereof to Greene & Gaynor, based on peonage wages of 25 cents per day, *i. e.*, 16 2/3 cents per day plus board.

There is no evidence whatever—only estimates—as to the actual cost of these mattresses to Greene & Gaynor.

The evidence as to brush mattresses is as follows:

1. Undisputed evidence of complainant's witnesses that the "estimated cost" to Greene & Gaynor of such mattresses at the wages paid by them to their laborers through peonage, *i. e.*, 16 2/3 cents per day with board, was about "15 cents" per square yard, *i. e.*, about one-sixth the market value of those mattresses.

The Circuit Court held as to the wages paid for labor by the contractors as follows:

"The evidence discloses a shameful course of treatment of the workmen employed by the contractors in cutting and otherwise handling the brush used in these constructions. They were paid little or nothing over and above their living, and that, too, of the worst." (Rec., 381.)

The Circuit Court of Appeals recited this finding in its opinion without dissenting from it. (Rec., 13417.)

2. The testimony of six government witnesses, viz., Gillette and five of his employees, such as A. S. Cooper, who was Carter's assistant engineer and who on August 7, 1897, just after Carter had left Savannah, stated in writing to Gillette, the complainant's chief witness, that 95 cents per square yard for brush mattresses was "about 1/3 to 1/2 more for the work" than the contractors "deserved" (Rec., 1345); and who on January 20, 1898, testified that he estimated the actual cost to the contractor of such mattresses to be "9 cents per square yard." (Rec., 1177.)

3. Testimony of Cols. Black and Gaillard from memoranda given them by Gillett, that a "sample" mattress never seen by them, which was made and sunk without Carter's knowledge after he had left Savannah, which admittedly contained only 4/9 of what the contract called for, would cost about 34 cents per square yard. (Ref., 200-09.)

4. The following testimony and evidence of witnesses for both sides showing that the market value of such mattresses (reckoned at the prevailing market value of wages to laborers) was fully as much as the prices complained of, *i. e.*, from 95 cents to $1.10 per square yard in the work, under said contracts with Greene & Gaynor from 1891 to 1896:

Gen. T. L. Casey, Chief of Engineers, made written contracts for brush mattresses at Mayport, Florida, adjoining Carter's district, in 1888, at 74 cents per square yard (Rec., 13251); at Cumberland Sound, Florida, in Carter's district, in 1891, at 97 cents per square yard (Rec., 10091); at Cumberland Sound, Florida, in 1892, at $1.05 per square yard (Rec., 10145); at Winyaw Bay, S. C., adjoining Carter's district, in 1892, at $1.05 per square yard (Rec., 9262; 9265).

General Alexander Mackenzie, Acting Chief of Engineers, made a written contract for brush mattresses at Savannah, Georgia, in 1896, at 95 cents per square yard (Rec., 10371), and at Cumberland Sound, Florida, in Carter's district, in 1896, at $1.10 per square yard (Rec., 10393).

Gen. W. P. Craighill, Chief of Engineers, testifies specifically in this case that he recommended the award of the Cumberland Sound contract of October 8, 1896, in Carter's district, at $1.10 per square yard. (Rec., 903; 12220.)

Gen. P. C. Hains, Corps of Engineers, made a written report to the Chief of Engineers in 1895 that a dollar per square yard was a

fair price for brush mattresses at Cumberland Sound, in Carter's district. (Rec., 13200).

Col. H. M. Adams, Acting Chief of Engineers, approved in writing the contract of July 20, 1891, at Fort Clinch, Florida, in Carter's district, for brush mattresses at 99 cents a square yard. (Rec., 10107.)

Col. W. S. Stanton, Corps of Engineers, made a written contract at Winyaw Bay, S. C., adjoining Carter's district, on November 8, 1892, for brush mattresses at $1.05 per square yard (Rec., 9265).

This was within two weeks of the letting of the "big contract" at Savannah at 95 cents per square yard.

Col. W. H. Bixby, Corps of Engineers, made a contract at Winyaw Bay, S. C., adjoining Carter's district, in 1891 for brush mattresses at 70 cents per square yard (Rec., 9242; 9245), the contractor at that same place having failed at 57 cents per square yard in 1890. (Rec., 8492.)

Col. W. M. Black, Corps of Engineers, made a written report to the Chief of Engineers in 1895 that $1 a square yard was a fair price for brush mattresses at Cumberland Sound in Carter's district (Rec., 13200), and Col. Black testified that a contractor under him in the adjoining district failed in 1891 at 70 cents per square yard (Rec., 698). Col. Black actually constructed such brush mattresses in 1888, in the district adjoining Carter's, and Black testified in this case that the actual cost of those mattresses to the government without any profit, interest on investment, risk, etc., was from "60 to 65 cents" per square yard (Rec., 698).

Col. T. H. Handbury, Corps of Engineers, made a written report to the Chief of Engineers in 1895 that $1 a square yard was a fair price for brush mattresses at Cumberland Sound in Carter's district. (Rec., 13200.)

Col. F. V. Abbot, Corps of Engineers, made a written report to the Chief of Engineers in 1895 that $1 per square yard was a fair price for brush mattresses at Cumberland Sound in Carter's district. (Rec., 13200.)

Maj. T. H. Rees, Corps of Engineers, now Division Engineer at Chicago, who was Carter's assistant on the Savannah work, testified that the fair cost, without any profit, of the brush mattresses used in the Savannah district in 1893 was from 60 to 80 cents per square yard (Rec., 2849).

Maj. Harry Burgess, Corps of Engineers, made a written report to the Chief of Engineers in 1895 that $1 per square yard was a fair price for brush mattresses at Cumberland Sound in Carter's district. (Rec., 13200.)

G. Y. Wisner, director Am. Soc. of Civil Engineers, testifies that the brush mattresses used at Savannah from 1891 to 1896 would cost at least 95 cents a square yard (Rec., 2624).

G. W. Brown, civil engineer, who was employed by Captain Carter on the work, testifies from his own knowledge that the fair cost of the

brush mattresses used in the Savannah district from 1891 to 1896 was from 80 to 85 cents a square yard (Rec., 852; 985).

R. S. Burnett, civil engineer, who was employed by Captain Carter on the work, testifies from his own knowledge that the fair cost of the mattresses used in the Savannah district from 1891 to 1896 was about 81 cents a square yard. (Rec., 986.)

J. W. Rutherford, a civil engineer of 28 years' experience, testifies that $1.05 a square yard was a fair price for brush mattresses at Cumberland Sound in Carter's district in 1895. (Rec., 3160.)

J. W. Daniels, inspector, who was employed by Captain Carter and who inspected and measured a large part of the mattress work in the Savannah District, testifies that the mattresses used from 1891 to 1896 cost from 75 to 85 cents per square yard (Rec., 995).

W. F. McCauley, a competitive contractor and a witness for the complainant, testifies that $1.13, the price he bid per square yard (Rec., 13239), was "very reasonable" for the brush mattresses used at Savannah under the 1892 contract (Rec., 1014).

Jacob Friday, a competitive contractor and the man who built the Charleston, S. C., jetties, testifies that the actual cost of the brush mattresses used in the Savannah district was from 80 to 90 cents a square yard. (Rec., 995.)

R. Moore, a competitive contractor, testifies that the lowest possible cost of the brush mattresses used in the Savannah district would be 60 cents a square yard, and that such cost would be increased 25 to 30 per cent. according to circumstances (Rec., 1015).

E. L. Friday, a competitive contractor, testifies that $1.12 a square yard was a "very reasonable" price for the mattresses used under the 1896 contract in Carter's district. (Rec., 996.)

S. W. Skinner, a competitive contractor, testifies that 95 cents to $1.10 a square yard was a reasonable price for the brush mattresses used in the Savannah district (Rec., 1021).

A. R. Stewart, a competitive contractor, testifies that $1 a square yard is a fair price for the brush mattresses used in the Savannah district in 1896 (Rec., 651).

R. G. Ross, a competitive contractor, who built the first brush mattresses ever used on the South Atlantic coast, testifies that the actual cost of such mattresses as were used in the Savannah district is about 90 cents a square yard (Rec., 8794).

Thomas E. Wallace, a competitive contractor, testifies that 95 cents to $1.10 a square yard is a reasonable price for the mattresses used in the Savannah district (Rec., 1022).

J. L. Grim, a competitive contractor, testifies that it costs from 80 cents to 95 cents a square yard to build the brush mattresses used in the Savannah district (Rec., 1008).

J. B. Sanford, a competitive contractor, testifies that the brush mattresses used in the Savannah district could not be built for less than from 95 cents to $1.10 a square yard (Rec., 1020).

I. H. Hathaway, a competitive contractor, who executed similar work on the St. Johns River, which is adjoining Carter's district, in

1892, testified that $1.10 per square yard for brush mattresses in the Savannah district is reasonable. (Rec., 1009.)

J. A. Bryan, a competitive contractor, who bid on similar work at Jacksonville, which is adjoining Carter's district, in 1889 and 1891, testifies that $1.10 per square yard is a reasonable price for the brush mattresses used in the Savannah district. (Rec., 1034.)

It is thus seen that the evidence is overwhelming and uncontradicted that the prices paid to Greene & Gaynor were the usual market prices for such brush mattresses placed in the work, and that they made their abnormal profits—*not* by a "raid" on the Government, but—by a "raid" on their laborers, from whom they obtained their labor for about one-sixth of its value.

Under such circumstances it is not strange that Greene & Gaynor tried to avoid a trial before a Georgia jury or that Robert F. Westcott, after Carter had been sent to prison, saved himself from being held as Greene & Gaynor's partner by trying to shift everything onto Carter.

C.

On November 6, 1901, after these suits were brought, a stipulation or agreement was made between the complainant and O. M. Carter, L. D. Carter and I. S. Carter in each suit, at Chicago, Savannah, New York, Springfield, Ill., and in West Virginia and New Jersey, which provided, among other things, what property should be turned over to the receiver, and what the liabilities of the Carters should be as to property theretofore "disposed of" by them and hence not turned over. This agreement also covered attorneys' fees, etc., already paid out or to be paid out in the future.

The Circuit Court held that the liability of L. D. Carter, I. S. Carter and O. M. Carter for assets "disposed of" by them prior to the contract of Nov. 6, 1901, was to be determined by that contract alone and that said contract exempted all of them from such liability.

The Circuit Court of Appeals also held that the liability of the three Carters was to be determined by the contract alone and held that L. D. Carter and I. S. Carter were exempt from liability for assets therefore "disposed of," but held that the contract meant diametrically opposite as to the other joint party to that contract, *i. e.*, O. M. Carter.

No reason is given by that court for any such conflict in the construction of the same contract, except the suggestion that as the contract covers attorneys' fees in the future, it does not cover attorneys' fees in the past.

But the contract not only covers attorneys' fees in the future, but exempts all the Carters from liability for all assets "heretofore *bona fide* disposed of by them and therefore beyond their control." (Rec., 13419.)

The contract itself construes the words *"bona fide"* as covering *all* moneys "paid out or pledged," "prior to the receivership," "for

attorneys' fees or as expenses in defense of Carter," etc. (Rec., 13421.)

As the contract by its terms expressly covers assets in issue "disposed of" by the three Carters, it is elementary that the contract covers the entire matter of assets "disposed of," and hence the two courts were right in holding to that effect.

The contract makes the Carters liable for assets "disposed of" to the following extent and no further:

1. They were charged by the bill with criminal fraud, and hence were not bound to testify or to give any information as to assets "disposed of."

The contract required them to "waive their privileges and give all the information they can with regard to what property has been disposed of and its disposition." (Rec., 13420.)

2. In order to save the right of the complainant to recover from third persons the "assets disposed of" by the three Carters, the contract provided that the Government reserved the right, "if any it has, to recover any part of said assets disposed of by the said defendants and not turned over to the receiver." (Rec., 13420.)

There is no provision in the contract authorizing the complainant if it fails to recover any of those assets from third persons, to recover the *value* thereof from the Carters.

From November 6, 1901, to April, 1908, the contract was always construed as exempting the Carters from liability for attorney's fees, etc., paid out prior to the contract, but in April, 1908, the complainant made an "election" to construe the contract exactly to the contrary as to O. M. Carter.

In the complainant's exception to the master's report filed April 24, 1903 (Rec., 317), the following written admissions are made:

(*a.*)

That I. S. Carter should be credited with payments made by him prior to "Sept. 1, 1901."

To F. P. Blair (attorney's fees) $6,200, etc., to A. J. Rose (Kellogg & Rose, attorneys' fees) $5,000. (Rec., 334.)

"Salary, 22½ months, at $300, of which expended $3,450." (Rec., 335.)

(*b.*)

That L. D. Carter should be credited with payments made by him prior to "Sept. 1, 1901."

To F. P. Blair, Atwood & Hooper, "Two attorneys' fees C. H. Grosvenor," A. J. Rose, J. M. Wilson, J. H. Winckler, all of which the record shows was for attorneys' fees paid prior to the contract of Nov. 6, 1901. (Rec., 347.)

It is undisputed that the present decrees against L. D. and I. S. Carter are only for a balance after giving them credit for all of said attorneys' fees paid out by them prior to Nov. 6, 1901.

The deficiency decree against O. M. Carter admittedly includes

the attorneys' fees, etc., paid out by L. D. Carter and I. S. Carter prior to Nov. 6, 1901, for which they were "given credit" under the contract of Nov. 6, 1901. (Rec., 420-421 and 13429.)

The other items of the deficiency decree are admittedly "attorneys' fees" before the "court martial" in 1898, etc. (Rec., 420.)

The Circuit Court of Appeals holds that if complainant "elects" to take a deficiency decree against O. M. Carter under the contract of November 6, 1901, it is entitled to do so.

The facts are that for many years prior to 1908 the complainant repeatedly construed the contract of November 6, 1901, as exempting L. D. and I. S. Carter from liability for assets theretofore "disposed of" and then in 1908 it "elected" to construe that contract exactly to the contrary as to the other joint party thereto, *i. e.*, O. M. Carter.

A litigant should not be allowed to thus reverse the grounds on which he seeks to recover, especially after the case has proceeded for many years on the practical construction of that contract by both parties to the effect that the Carters are not liable for assets "disposed of" prior to November 6, 1901.

The only difference between O. M. Carter and L. D. Carter or I. S. Carter is that the latter two were agents for the former; but the contract makes no mention of that fact, and makes L. D. Carter and I. S. Carter joint principals, and there can be no doubt that under the contract they are jointly liable as principals for the performance of the entire contract, and could not escape such liability on the ground that under the contract they were dealt with as agents and not as principals.

In any event, it is submitted that certain words in the contract cannot be construed to mean one thing as to one of the parties thereto, and a diametrically opposite thing as to another of the parties thereto.

It is submitted therefore as follows:

(1) That the contract of November 6, 1901, specifically covers "assets disposed of," and hence as a matter of law covers that entire subject.

(2) That the three Carters are treated in that contract on exactly the same footing.

(3) That the reservation in said contract of the right of the complainant, "if any it has," to recover "assets disposed of," is exactly the same as to O. M. Carter as it is with regard to L. D. Carter or I. S. Carter; so that if recovery is had thereunder against O. M. Carter, then a similar recovery can be had against L. D. Carter and I. S. Carter.

(4) The complainant has repeatedly construed that contract as meaning that recovery cannot be had under that contract against L. D. Carter and I. S. Carter, for assets disposed of by them.

(5) That the words in question in the contract must be construed to mean the same as to all parties to that contract.

(6) The reserved right "to recover any part of said assets disposed of by the said defendants" is utterly insufficient to warrant a recovery against the defendants for the value of those assets in case the complainant is unable to recover the assets themselves.

But even as a matter of law the complainant cannot recover, because the bill of complaint does not authorize any recovery except for the specific securities sued for. (*Hayward* v. *National Bank*, 96 U. S., 614.)

This is not a suit to set aside the contracts with Greene & Gaynor, and they are not parties to the suit.

It is not a suit making Robert F. Westcott a party to recover from him his share of Greene & Gaynor's profits.

It is not a suit to recover from Carter as an express trustee money delivered to him by the complainant and not accounted for, as no one pretends that Carter did not pay the money out in accordance with the contracts, which were written orders to him, or that Carter failed to account to the Government for all moneys delivered to him.

It is not a suit to recover form Carter profits received by Westcott and paid out by Westcott.

Nor is it a suit to recover from Westcott what Carter paid out under Westcott's authority or as Westcott's agent.

Nor is it a suit to recover from Carter what he (Carter) as Westcott's agent or under Westcott's authority paid out prior to the time Westcott's authority to Carter was suspended by these suits. Westcott gave the securities to Carter at a time when Westcott had the legal title to them, and Westcott authorized Carter to dispose of them, and Carter acted under that authority until it was suspended by these suits.

These suits are in effect an equitable attachment of that part of Westcott's profits undisposed of in the hands of his agent, Carter, at the time these suits were brought, and Carter is made a party defendant in order to cut off his legal title thereto.

It is hence submitted that the decree of the Circuit Court exempting all three of the Carters from liability as to assets disposed of prior to November 6, 1901, is correct, and that the decree of the Circuit Court of Appeals, reversing the Circuit Court on that point as to O. M. Carter, is erroneous.

D.

The bill of complaint alleges "that on or about the year 1891," Oberlin M. Carter conspired with certain contractors, known generally as Greene & Gaynor, to defraud the United States; that this "fraudulent scheme" or "conspiracy" contemplated that "by undue shortness of time in advertising," by "withholding specifications from proposed bidders not in the conspiracy," by drafting specifications "so as to mislead proposed bidders not in the conspiracy," by "secretly furnishing to his co-conspirators information as to the bids and as to

his future conduct as engineer officer in charge in the construction of the work under the contract," the said Carter would "effectually suppress competition in the bidding," and that thus the "contracts would be fraudulently let for the benefit of said conspirators at high and exorbitant cost."

The bill further alleges that the "conspiracy" contemplated that Carter would call for "two or more designs of mattresses specified at one price," and that the alleged conspirators would be informed by Carter "before the bidding that only the cheapest design of those specified in the specifications would be called for," so that said alleged conspirators could bid a "very high price" and still "underbid all other bidders and obtain the contract."

The bill further alleges that the "conspiracy" contemplated that Carter would prepare improper specifications so that thereunder he could accept "material of very poor and cheap quality" from the alleged conspirators, and could reject similar material if some other bidder got the contract; that Carter would so arrange "that there would be little if any inspection" of the work done by the alleged conspirators; that Carter would pay his alleged co-conspirators "for such inferior material and work to be put into said works as aforesaid and at the exorbitant and fraudulent prices stated in such contracts"; that Carter and his alleged co-conspirators "should aid each other in the concealment" of these alleged crimes; and that they would finally divide between themselves "the net profits" of such contracts.

The bill then alleges that said Carter "did on or about the first day of January, 1891, commence to put said fraudulent scheme in operation"; that he performed all the acts hereinbefore set forth as constituting or proving said conspiracy; that he further improperly permitted the contractors to sink brush mattresses several at once, or in multiple, which it is alleged "was very much cheaper for the contractor to put in than the cost of putting in the single mats"; and that "the said conspirators have continued to aid and abet each other to this day."

Oberlin M. Carter made answer to the allegations of the bill of complaint, stating under oath that "this defendant denies as a whole, and denies in every part, both generally and in detail, that he ever conspired to do, or attempted to conspire to do, or that he ever did or attempted to do, or discussed doing or ever thought of doing, either alone or in connection with others, or ever aided or advised or permitted others to do or attempted to do, or ever knew of others doing or attempting to do, or discuss or conspire doing or attempting to do all or any of the acts or things, or any part thereof" which are described in the bill of complaint as hereinbefore set forth: and Carter further made specific denial under oath of the various specific charges alleged against him.

On this issue, the burden of proof was on the complainant to prove the conspiracy alleged. The Circuit Court, as will be shown later

herein, held specifically against the complainant on every alleged fact set forth in the bill as constituting or making out the conspiracy charged, holding that there was no undue shortness of time in advertising, no withholding of specifications from proposed bidders, no improper drafting of specifications, no secret information to the alleged conspirators, no improper material used or improper inspection of the work, that it was right to call for three designs of mattresses at one price, because all three designs cost the same, that it was right to purchase mattresses by the square yard, not only because they had always been so purchased, but because the United Stated saved greatly thereby, that it was right to sink mattresses in multiple, because it did not aid the contractor, but did aid the United States,—in short, that every charge made against Carter in the bill as the basis of the alleged conspiracy was false.

The Circuit Court, therefore, refused to hold that any conspiracy ever existed at all, which, under well-settled rules of law, is a finding against the complainant.

The Circuit Court of Appeals affirmed all the findings of fact of the Circuit Court, setting forth in detail many of those findings (Rec., 13409), and its express concurrence is set forth in full on page 3 hereof.

E.

The "chain of circumstances" to which the Circuit Court of Appeals alluded has been set forth on page 3 hereof.

In order to determine the exact ground upon which the Circuit Court of Appeals based its opinion, it is proper to consider the links of that "chain of circumstances," (a), (b), (c) and (d), more in detail:

As to (*a*), the question of whether or not Carter discovered in October, 1893, that Greene & Gaynor were making abnormal profits under the big contract is immaterial, as that court holds the contract was honestly let, and fully performed, hence the profit or loss thereunder is a matter in which the government had no concern, whether Carter learned of said profits or not.

As to (*b*), the fact that four years later Westcott gave the proceeds of some of his profits to his son-in-law, Carter, is immaterial, as the contract was honestly let and fully performed, and Westcott had a lawful right to be a partner with Greene & Gaynor, and might give his share of the profits to whomsoever he pleased, especially in October, 1897, after Carter had left Savannah, and after the work was completed.

As to (*c*), Carter could not repudiate the big contract simply because the contractors were making abnormal profits in performing it, but he was bound to pay the contract prices until the contract was completed.

As to (*d*), *i, e.*, the letting of further contracts after October, 1893, the opinion of the Circuit Court of Appeals as to "connivance" is in

effect based on that alleged "fact alone." It will be seen hereinafter that the court erred in its view of the contracts let after October, 1893.

Further with respect to (*a*): There is no pretense of any direct evidence that Carter ever knew the contractors were making abnormal profits, and the only circumstantial evidence given by the Court of Appeals as indicating that he "must have discovered" the existence of such profits is simply that Carter was "an engineer of great experience and ability in harbor improvements." (Rec., 13426.)

With regard to Carter's knowledge of "divisions" of the contractors' profits with Westcott, the Court of Appeals held specifically that:

> "It does not appear, however, that Carter took part in or was present at any of the divisions referred to between the contractors and Westcott; nor is there any direct evidence that he was informed thereof, or was mentioned or intended in such transactions to be the beneficiary." (Rec. 13425.)

Further with respect to (*b*): The Circuit Court held that Westcott was a partner with Greene & Gaynor on his own behalf (Rec., 387), and refused to hold that Carter ever knew of such partnership, stating strong facts which show that he never knew of it. In referring to the $3,000,000 of contracts let to Greene & Gaynor in 1896, the court says that Carter sought and obtained a transfer to London. This was before Carter had ever paid out a dollar on those contracts. (Rec., 8412-22; 8802.) The court assumed that if Carter had been interested in the contracts prior to 1896 he would likewise have been interested in the large contracts of 1896, and he would not voluntarily have asked for a transfer from Savannah to London, but would have stayed to get his share of the profits. The Circuit Court held concerning this matter as follows:

> "There are some *ad hominem* considerations which may serve as makeweights in arriving at a just estimate of Carter's conduct. He withdrew from the charge of the work for the purpose of accepting a position of honor as Military Attache at the court of St. James and Army Engineer of the Nicaragua Canal Commission. There is nothing to indicate that he was forced to do so. Is it likely that he would have left matters in such shape as to put himself and his honor into the hands of his successor? And again, if he were conniving at personal profit, would he have naturally retired from the service in the face of the opportunity just at hand to reap large additional profits from the Cumberland Sound contract?" (Rec., 379.)

The Circuit Court further held:

> "For Carter, it is asserted as above stated, that if Westcott had any interests in the several contracts in suit, Carter was

never advised thereof, and never suspected it; that Westcott held him in tender regard as the surviving husband of his deceased daughter, and lavished upon him large sums of money from his great wealth, and promised to make him his heir in place of his deceased daughter, Carter's late wife; and that, admitting the receipt by Westcott of large sums of money from Greene & Gaynor, a considerable part of the property in suit was not purchased with moneys derived from that source, or with any moneys which arose from any government contract; that when the securities were turned over to him by Westcott, he supposed Westcott was carrying out his promise to make him his beneficiary. There is no legal presumption here that Carter knew what was going on and had been a party to it." (Rec., 381.)

The Circuit Court found that Westcott was a partner with Greene & Gaynor on his own behalf. (Rec., 387.)

The Circuit Court of Appeals did not reverse this finding but held that "Carter is equally subject to the relief sought in this bill whatever may be the actual relation of Westcott to either of such parties in the transactions" (Rec., 13427), and that same court *did* hold specifically that *"it does not appear, however, that Carter took part in or was present at any of the divisions referred to between the contractors and Westcott."* (Rec., 13425.)

And that same court then held further "nor is there any direct evidence that he [Carter] was informed thereof, or was mentioned or intended in such transactions [the transactions between Westcott and Greene & Gaynor] to be the beneficiary" (Rec., 13425), and that court then proceeded to hold that "the actual relation of Westcott" makes no difference in this case (Rec., 13427), *i. e.*, in the opinion of the Circuit Court of Appeals it made no difference whether Westcott was a partner with Greene and Gaynor or not; because, *in the opinion of that court, the only ground of recovery by complainant was based on the question of the price paid for brush mattresses.*

The decree which is affirmed specifically negatives the claim of complainant that Carter ever had the securities in controversy prior to October, 1897; as it affirmatively states that he received the same in October, 1897, from Robert F. Westcott. (Rec., 391.)

The uncontradicted evidence shows that Carter received the securities in question from Westcott openly and above board in the law office of Elihu Root, in the presence of Mr. Root's partner, Henry L. Stimson, who was Westcott's attorney, and of his own attorney, supposing he was receiving his deceased wife's share of her father's estate (Rec., 6278); and the fact of Carter's being on trial at that very time, charged with receiving money from Greene & Gaynor, and of nevertheless, publicly signing written receipts for those securities, conclusively negatives the idea that he had any knowledge that

the securities he was receiving had been purchased with money coming from Greene & Gaynor.

Further with respect to (c): The court finds it suspicious that Carter paid the contract price for the mattresses used under the contract of 1892 after October, 1893. The contract of 1892 was *not* for a specific amount of brush mattresses, but that contract expressly states that it is for all "such materials and work as may be necessary to complete the present project of improvement of the harbor at Savannah." (Rec., 10154.) The specifications to the contract give these "materials and work" as follows: "Mattress work," "fascines," "pile work," "fender piles," "tie piles," "sawn timber," "iron," "rip-rap stone," "large stone," "wharfing," and "material to be dredged" (Rec., 10163); and the contract gave the engineer in charge power to call for such amounts of any of those materials as he found necessary as the work progressed, irrespective of the original estimates of how much of each material might be required. (Rec., 10163, 10162.) It took about three years to complete the project, and after the work had been going on for about a year, *i. e.*, about October, 1893 (Rec., Vol. 29, Ex. 150), Carter found that it would take more mattresses, and less dredging, stone, etc., than originally estimated, to produce the best results, so in order to complete the work covered by the contract properly, he called for more mattresses from time to time, resulting altogether in the use of about $1,000,000 more brush mattresses than he originally estimated would be required, and the omission of about $1,000,000 of other material and work. (Rec., 13423.) Concerning this, the Circuit Court of Appeals, affirming the finding of the Circuit Court, says that Carter "was thus able to keep within the estimate of the cost of the whole and within the appropriation, while, at the same time, he accomplished the results sought for." (Rec., 13411-12.) The uncontradicted evidence is that by such change the government saved more than $1,000,000 in mattresses and stone that would have been required if brush mattresses had been sunk singly each with a load of stone, thus sinking them deeper in the mud, etc. (Ref. No. 11), (Rec., 8054-55).

The Circuit Court of Appeals held that "the discretion of the engineer officer in charge [Carter] was rightly exercised in greatly extending the mattress work, instead of carrying out the plan of widening the channel by dredging (as let to another contractor) and of stone work (embraced in the Greene & Gaynor contract)" (Rec., 13426); *and that court also held that its opinion "is not to be understood as intimating doubt, either of authority to make such changes in the interest of the government, nor that such substitution were not effective for a great work in the improvement of harbors."* (Rec., 13423.)

So that it appears Carter was right in using nearly $1,000,000 of brush mattress work under the contract of 1892 after October, 1893, and the court has so held. Furthermore, that court said it assumed the "terms contracted for were fairly obtained" (Rec., 13426), and

that Carter believed them "to be reasonable when made" (Rec., 13426), *i. e.*, that the contract of 1892 was honestly let at a proper price; and the only adverse finding on this point by the court is that it was wrong for Carter to pay "the same terms," *i. e.*, the contract price, for the mattress work done under that contract after October, 1893. This, it is contended, is an erroneous conclusion of law by the Circuit Court of Appeals, as Carter was obliged to pay the contract price, irrespective of whether or not the contractors were making large profits.

Complainant contends that five-sixths of the money awarded to the complainant by the decrees herein came from that contract. (Rec. Ex., 216; 319.)

That the contract price was the fair market price for such mattresses see *ante,* pp. 6-9.

Further with respect to (*d*): The Circuit Court of Appeals finds that Carter let similar contracts after October, 1893, and bases its only finding of fact which it says indicates "connivance" on "the fact alone" that after October, 1893, Carter let other contracts for similar brush mattress work to Greene & Gaynor at similar high prices (Rec., 13427), and received securities from Westcott in October, 1897, and says that this "fact alone" "implies either participation in benefits or collusion on the part of the officer having direction of the work." (Rec., 13427.)

This is a new finding, not made by the Circuit Court, and if it be an erroneous finding, then the only link left in the "chain of circumstances" held by the court to indicate connivance disappears, and the finding falls.

The facts in that regard are as follows: Only four contracts for brush mattress work were ever let by Carter after October, 1893. (Rec., 9865.)

The first of these was let on November 15, 1894, but the contract price of brush mattresses thereunder was only 57 cents a square yard due to exceptional conditions (Rec., 3743; Rec., 10320), a price only a trifle more than one-half of that complained of (95c-$1.10), and a price which Col. Black of the engineers, a government witness, found by actually building such mattresses, at the prevailing price for labor, to be much below actual cost, such actual cost *without profit* being from "60 to 65 cents" per square yard (Rec., 693), and a price at which Col. Bixby of the engineers testifies a contractor under him failed. (Rec., 8492.)

The second contract was let on April 20, 1895, but only the insignificant amount of 13,898 square yards were used under that contract (Rec., 10337), or about one-half of 1 per cent. of the mattresses in controversy.

The other two contracts were both let on October 8, 1896, and both courts hold that neither Carter nor Westcott ever derived any profit or benefit therefrom (Rec., 359, 379, 391, 13432), and that Carter "voluntarily" sought and obtained a transfer to London (Rec.,

379, 13409), which was before a dollar had been paid out on these contracts. One of these 1896 contracts was let on plans prepared by a special Board of Engineers composed of six officers, and that Board estimated the cost of brush mattresses at $1 per square yard. (Rec., 13200.)

That both courts held neither Carter nor Westcott received any benefit or profit from the 1896 contracts is shown by the following:

The Circuit Court held as follows:

> "It does not appear that any part of the property sought to be recovered herein was procured with moneys accruing to Greene & Gaynor out of this latter contract" (*i. e.*, the 1896 contracts) (Rec., 359).

This finding is not disturbed by the Circuit Court of Appeals.

The entire claim of complainant is that whatever Robert F. Westcott received he sooner or later gave to Carter, so that if Carter did not receive certain money Westcott did not receive it. (Rec., 38.) The bill of complaint alleges that the profit from the 1896 contracts "was divided in thirds between the said Benjamin D. Greene, John F. Gaynor and Oberlin M. Carter" (Rec., 20.)

The complainant sues herein for that money. (Division 32; Rec., 22.) The decree says that complainant is entitled to all profits. (Rec., 389.) Admittedly, however, the decree does *not* give the complainant any profits from the 1896 contracts. (Rec., 391; 13432.)

This is a distinct finding against the complainant's allegations that Carter or Westcott received anything from the 1896 contracts!

So that, when the facts are known, namely, that Carter did not share in the profits of the only two large contracts let after October, 1893, and that as to the only other one of importance, he let it at about one-half of the price complained of, and at a price far below the actual cost of such mattresses, and yet required the contractors to use four times the amount set forth in that contract, this finding should have been that Carter had no interest in the letting of said contracts, except to do his duty to the United States, and had no expectation of gain therefrom, else he would have remained in charge of that work until it was completed and paid for, as the record shows he could have done.

F.

The bill of complaint alleges that the conspiracy in question commenced "early in 1891," and continued as the same conspiracy until the present trials were brought in 1901.

The Circuit Court held there was never any conspiracy at any time.

The Circuit Court of Appeals held that no conspiracy was found up to October, 1893, *i. e.*, the time when Carter began to call for more than 350,000 square yards of brush mattresses under the big contract of October, 1892.

Nevertheless, the profits of Greene & Gaynor received by Robert F. Westcott, prior to October, 1893, were awarded by both courts to the complainant. This is not only a fatal variance as to the conspiracy upon which the bill is predicated, but *it leaves the award of profits to the complainant prior to October,* 1893, *without any basis whatever upon which to stand.*

The Circuit Court of Appeals says that "the settled facts above recited" (namely, the facts that the specifications were properly drawn, the advertising properly done, the contracts properly let, etc.), do not uphold the "charge of conspiracy between Captain Carter and the contractors" (Rec., 13426, 13425); and then says that even if a conspiracy did exist it was not the conspiracy charged in the bill, saying that whether a conspiracy existed "at or prior to the letting of the contract of 1892 can neither be ascertained from the testimony, nor is such inquiry deemed material upon the issue" (Rec., 13426). That court then proceeded to hold that everything was all right up to the time Carter had used 350,000 square yards of brush mattresses under the big contract, which was in October, 1893, at which time that court suspects Carter "must have discovered" Greene & Gaynor's large profits and Westcott's partnership therein, and commenced to "connive" at the same.

That court then mentions the contracts let after October, 1893, which have already been considered.

As there is no pretense that Carter had "discovered" what was going on prior to October, 1893, he could not have been guilty of conspiracy prior to October, 1893.

As the bill alleges a conspiracy commencing in 1891 and continuing until 1901, and consisting of improper methods of letting contracts, etc., it is submitted that no recovery can be had on an alleged connivance consisting of proper methods of letting contracts, etc., commencing in October, 1893, which, as has already been seen, is based upon an erroneous view of the contracts let after that date; and especially is it submitted that there can be no recovery of profits made prior to October, 1893.

G.

The "big contract" of October 22, 1892, for improving Savannah harbor, as the Circuit Court held, is "typical of all the contracts," and, as the Circuit Court of Appeals held, "is the main subject of controversy" (Rec., 359; 13423).

The Circuit Court held (the Circuit Court of Appeals not disturbing it) that Carter's father-in-law, Robert F. Westcott, secretly and on his own behalf, "was a partner of Greene & Gaynor," and received "one-third" of their profits, substantially all of it, in 1893-4-5. (Rec., 387-88).

The evidence being overwhelming that Carter never knew of Westcott's partnership, the Circuit Court refused to sustain the complainant's claim that he knew of it, and the Circuit Court of Appeals

found there was no "direct evidence" that he ever knew of it (Rec., 13425), but that there was some circumstantial evidence "tending to prove" that "with the completion of the mattress work expressly stipulated," *i. e.*, after the "big contract" had been running about a year, Carter "must have discovered" it (Rec., 13426), but that court made no findings of fact on the subject, and held, as a matter of law, that it made no difference whether Carter knew of "the actual relation of Westcott" to the contractors or not (Rec., 13427).

Both courts held that the money in court was received by Carter from his father-in-law, Westcott, in October, 1897 (Rec., 391; 13432), the undisputed evidence showing that Carter received it openly and above board in the law office of Elihu Root supposing he was receiving his deceased wife's share of her father's estate (Rec., 6278).

If the complainant had sought to recover this money from Carter solely on the ground that an engineer officer of the United States army cannot receive and hold any profits derived from contracts under his charge, even though he received them honestly and innocently, a different question would have been presented from that submitted by the complainant in this case.

The bill was not framed on that theory, however, for in the case at bar the complainant seeks to recover those profits on the ground that the contract was not properly performed, and that the contract price for brush mattresses was excessive, all in fraud and to the damage of the United States.

The Circuit Court of Appeals (affirming the findings of fact of the Circuit Court, all of which were in Carter's favor) held as follows:

> "We concur, therefore, in the opinion filed by the trial judge, that the charge of conspiracy between Captain Carter and the contractors to defraud the United States, under the contracts referred to, is: (*a*) neither established by direct evidence, (*b*) nor can such charge be upheld under the testimony alone of methods adopted in making specifications, advertising for bids, treatment of proposed bidders, or letting contracts, (*c*) nor under one or the other several branches of testimony reviewed in the opinion, considered independently of the entire chain of circumstances." (Rec., 13425.)

The "chain of circumstances" having hereinbefore been considered and disposed of, it results that the finding of the Circuit Court of Appeals is as follows:

1. That the contract was let on public "bids" as required by statute (Rec., 13423);

2. That it was let at the prices bid by the "lowest bidders" (Rec., 13423);

3. That it was approved by the Chief of Engineers before it became effective (Rec., 363; 368; 13423);

4. That "the work as constructed" was done and paid for accord-

ing to the terms of the contract, and that "it is an impressive fact in this case that the defendant is so emphatically endorsed by these men [the witnesses named] who are above suspicion" (Rec., 13416);

5. That the contract was "fairly obtained" (Rec., 13426);

6. That the "specifications" were right (Rec., 13425);

7. That the "advertising for bids" was right (Rec., 13425);

8. That the "treatment of proposed bidders" was right (Rec., 13425);

9. That the "methods" of "letting contracts" was right (Rec., 13425);

10. Affirmance of the finding of the Circuit Court that the contractors furnished "more material" per square yard of mattresses paid for than their contracts required (Rec., 378).

11. That Carter believed the "terms" of the contract were "reasonable when made" (Rec., 13426);

12. That no "conspiracy" is "established by direct evidence" (Rec., 13425);

13. That Carter's discretion "was rightly exercised in greatly extending the mattress work" done under that contract beyond what he originally estimated, and "omitting other work," such as "dredging," "stone work," etc. (Rec., 13426); that he made "such changes in the interest of the government"; and that those changes were "effective for a great work in the improvement of harbors" (Rec., 13423).

The Circuit Court not only held that it was a great work, but said that the results accomplished "had long been sought for without avail," and that it was "a triumph of engineering skill."

To overturn the foregoing findings in Carter's favor, both courts hold as a matter of law, that it was "a raid upon the government" for Greene & Gaynor to make abnormal profits, by peonage or otherwise, on the "brush mattresses" required under said contracts, and that Greene & Gaynor thereby forfeited not only their profits on said "brush mattresses," but their profits on all other work and materials furnished under said contracts, as well as under contracts where no "brush mattresses" were used. (Contracts 4655, 4963, 5127, 5133 and 5254.)

H.

The Circuit Court of Appeals state that the "basic averments of the bill of great losses suffered by the United States" are founded on the claim that the prices named in the contract are "grossly in excess of value."

To sustain the claim that the prices are "grossly in excess of value" the complainant attempted to prove as follows:

(*a*) That the contractors made abnormal profits under the "big contract;"

(*b*) That about two years after that contract was completed charges were made of collusion between Carter and the contractors, and that

Westcott induced Carter to take the proceeds of what Westcott had received, whereupon Westcott, who the Circuit Court held was secretly one of the contractors, fled to Europe.

As has already been shown, the defendant proved by 12 engineer officers of the United States army, 5 civil engineers and inspectors, and 12 disinterested competitive contractors, all of whom were familiar with such work and whom the trial court held to be "above suspicion," that the prices named in the contract were the fair and usual prices for such work, and as low as the work could be performed for by contractors who paid the prevailing wages for labor. *There is no evidence to the contrary.*

The record shows that the difference between the testimony of the witnesses for the complainant that the prices were excessive, and the testimony of the witnesses for the defendant that the prices were the fair and usual prices for such material and labor, is due to the fact that the witnesses for the complainant based their testimony on what the complainant's own witnesses testified the contractors paid for labor, *i. e.*, one dollar a week and board (which was about one-sixth of its market value), whereas the witnesses for the defendant based their testimony on the prevailing market prices for such labor.

Both courts held as to the wages paid for labor by the contractors as follows:

> "The evidence discloses a shameful course of treatment of the workmen employed by the contractors in cutting and otherwise handling the brush used in these constructions. They were paid little or nothing over and above their living, and that, too, of the worst." (Rec., 381; 13417.)

But both courts held that the overwhelming testimony and evidence (which is substantially uncontradicted) that the contract prices were the fair and reasonable prices for the work performed, was not the test in this case, but that the true test was whether or not the contractors made abnormal profits.

I.

The profits of the contractors, as shown by the record, are as follows:

1. A normal profit.
2. Profits made by a "raid" on the laborers.
3. Profits, if any, in excess of above.

Twelve army engineers, 5 civil engineers and inspectors, and 12 disinterested competitive contractors, all testify in effect that the prices paid to Greene & Gaynor were fair market prices based on prevailing wages to laborers. There is no evidence to the contrary. If their evidence prevails, then all of Greene & Gaynor's profits in excess of a normal profit was made by abnormal practices.

Query: Can the United States reap the benefit of those abnormal practices?

Both courts below hold that part of Greene & Gaynor's profits were made by a raid upon their laborers. "How much can never be ascertained." (Rec., 382.)

Yet both courts hold that the United States is entitled to the proceeds of that raid upon those laborers.

Will this court affirm that holding on any ground whatever? It it submitted that it will not.

J.

The term "raid upon the government" is used by both the courts below. What is meant by it?

Take for instance the "big contract," up to October, 1893.

Both courts hold that contract was honestly let according to law, and was honestly performed accordingly to its terms; and yet both courts held that this was a "raid upon the government," so that all profits of every description can be recovered by the government.

On the facts found by both courts, the contract was "fairly obtained" and fully performed, and the ordinary rules of law are elementary that the complainant cannot recover.

But both courts lay down the unusual rule of law in this case that simply because the profits were abnormal the complainant can recover those profits as a "raid upon the government."

This, it is respectfully contended, is not the law.

K.

The big contract required the contractors to "complete" the work, *i. e.*, to furnish all

> "such materials and work as may be necessary to complete the present project of improvement of the harbor at Savannah, Georgia" (Rec., 10154),

and left it optional with the engineer in charge to call for brush mattresses, log mattresses, or stone, in the quantities of each found proper as the work proceeded, regardless of the original estimates of how much of each material might be required.

It took about three years to complete the work under the "big contract." About a year after that work had begun, *i. e.*, in October, 1893, Carter found that more mattress work and less stone, dredging, etc., than originally estimated, would produce the best result, and in order to complete the work covered by the contract, he called for more mattresses from time to time, resulting altogether in the use of about $1,000,000 of brush mattresses more than he first estimated would be used, and in the omission of about $1,000,000 of other materials and work.

Concerning this the Circuit Court of Appeals in affirming the finding of the Circuit Court says, that Carter

> "was thus able to keep within the estimate of the cost of the whole and within the appropriation, while, at the same time, he accomplished the results sought for" (Rec., 13411);

and the Circuit Court of Appeals held specifically that

> "the discretion vested in the officer in charge [Carter] was rightly exercised in greatly extending the mattress work, instead of carrying out the plan of widening the channel by dredging (as let to another contractor) and of stone work (embraced in the Greene & Gaynor contract)" (Rec., 13426);

and the Circuit Court of Appeals further distinctly states that its opinion

> "is not to be understood as intimating doubt, either of authority to make such changes in the interest of the government, nor that such substitutions were not effective for a great work in the improvement of harbors" (Rec., 13423).

It thus appears that the Circuit Court of Appeals distinctly held that the "big contract" was properly performed after October, 1893, by using $1,000,000 more of brush mattress work than was originally estimated, and omitting $1,000,000 of "stone work," "dredging," etc.

That court, however, says it was a fraud upon the government to pay "the same terms," *i. e.*, the contract price for the $1,000,000 of brush mattresses which were used under that contract after October, 1893.

The Circuit Court held as a conclusion of law, that abnormal profits made by contractors with the government constitute a "raid upon the government" which entitles the government to recover all of the contractors' profits, whether they were made in the manner complained of in the bill or not. (Rec., 382.)

The Circuit Court of Appeals adopted and affirmed that conclusion of law. (Rec., 13426.)

The Circuit Court held as a conclusion of law, that Carter was bound to know the contractors were making abnormal profits and that Westcott was a partner with them. (Rec., 382.)

The Circuit Court of Appeals reversed the Circuit Court as to that conclusion of law. (Rec., 13426.)

The only difference between the decision of the Circuit Court and the decision of the Circuit Court of Appeals is that the Circuit Court held as a conclusion of law, that because the contractors were making abnormal profits on the "brush mattresses" in dispute, the complainant could keep the work and recover all profits made on all materials; whereas the Circuit Court of Appeals, made the one new finding of fact hereinbefore mentioned and shown to be erroneous, and based its decision that the complainant could recover upon that one alleged fact and upon the same conclusion of law as the Circuit Court, *i. e.*, that abnormal profits made by a government contractor constitute a "raid upon the government," regardless of whether the

contracts were honestly let and fully performed or not, and regardless of whether those abnormal profits were made by a raid by the contractor upon his labor or not.

Both courts below held as a conclusion of law, that abnormal profits made by a contractor with the government constitutes in and of itself "a raid upon the government."

The Circuit Court reinforced its conclusion on that point by holding, as a conclusion of law, that Carter was bound to know that the contractors were making abnormal profits.

The Circuit Court of Appeals held that it made no difference whether he knew or not, as that court awarded to the complainant the profits made after the time the court held he "must have discovered" said abnormal profits, and it also awarded the profits made prior to the time he "must have discovered" the existence of these profits.

The Circuit Court of Appeals reinforced its opinion by its one new finding of fact already shown to be erroneous, that Carter let subsequent contracts at high prices, and received securities from Westcott, after he "must have discovered" said abnormal profits, but that he was not bound as a conclusion of law to know about them; but that finding was entirely immaterial, as that court held the complainant could recover all the contractors' profits made prior to the time that court says Carter "must have discovered" the existence of those abnormal profits, as well as all profits made subsequent to that date.

Both courts below hold also that the complainant may recover not only all of the profits made on brush mattresses, the only materials in dispute, but in addition may recover the undetermined profits made on all materials *not* in dispute, such as "fascines," "pile work," "sawn timber," "iron," "rip-rap stone," etc.

This, it is respectfully contended, is not the law.

L.

The facts, which are undisputed, show that as to the contracts let after October, 1893, there was no possible gain to Carter, and as a consequence, the findings of the Circuit Court of Appeals thereon are not justified.

This leaves a single conclusion of law as the sole basis of the finding against Carter, and that conclusion is, that under a contract, honestly awarded according to law, and honestly performed, and under which there were used only the materials called for by the contract, and which the interest of the government demanded should be used, if the engineer officer has reason to suspect the contractor is making an undue profit, by oppression of his labor or otherwise, then the engineer must require the contractor to put into the work the materials required by that contract, but he must not pay the contract price therefor, and if he does so, then the government can

recover all of the profits made by the contractor in any manner whatever, and can find the engineer officer guilty of conspiracy to defraud the government.

It is respectfully submitted that where, as in this case, contracts were made according to law, and were honestly awarded and fully performed in the best interests of the government, the fact of abnormal profits made by the contractors under those contracts does not entitle the government to recover those profits nor to repudiate those contracts, nor to obtain a decree against the officer in charge that he was guilty of any fraud in the premises, or that he was guilty of any fraud in innocently receiving, long after the work was completed, a portion of the proceeds of those profits legitimately made by his father-in-law, who the Circuit Court held was secretly one of the contractors.

M.

In this suit the complainant does not seek to rescind the contracts, but keeps the property delivered under those contracts and seeks to recover whatever it paid in excess of what the contractors actually paid for what they delivered.

There is no rule of law authorizing the complainant to recover on any such basis.

N.

In conclusion, it is respectfully submitted as follows:

1. The prices paid for brush mattresses were fixed by public bidding according to law and were the usual market prices and hence the complainant was not damaged by the payment of said prices.
2. The record shows conclusively that the defendant, Oberlin M. Carter, never committed any fraud upon the United States, nor did he ever participate in any fraud; and no fraud upon or damage to the United States is shown by said record.
3. Robert F. Westcott might lawfully be a partner with the contractors and might give his profits to whomsoever he pleased. All the property awarded to the complainant herein was given by Westcott to Carter long after the work in controversy was completed, and after Carter had been transferred to London, and as all the contracts were honestly let and fully performed, none of the profits can be recovered by the complainant from anybody.
4. Part of said profits came from peonage, or a raid by the contractors on their laborers, and the United States cannot recover in a court of equity the proceeds thereof.
5. The deficiency decree against Oberlin M. Carter is erroneous.
6. The bills of complaint should be dismissed for want of equity with costs.

Respectfully submitted,

J. B. FORAKER,
Solicitor for Oberlin M. Carter.

DECEMBER 17, 1909.

APPENDIX.

ADDITIONAL REFERENCES TO RECORD SUPPORTING FOREGOING STATEMENTS.

That the Circuit Court found all facts in Carter's favor, see Opinion (Rec., 358, *et seq.*)

That the Circuit Court of Appeals affirmed all of said findings, see Opinion (Rec., 13425), beginning with words "we concur."

For the detailed findings of the lower courts in Carter's favor on each point charged against him, see the volume submitted herewith and entitled "Bill of Complaint, Findings of the Courts, and References to the Evidence." This volume is referred to as "Ref."

That only one new fact was found by the Circuit Court of Appeals and its decision was based thereon, see *ante*, p. 3.

That the "big contract" was practically completed in July, 1895, see (Rec., Vol. 30, Ex. 319).

That some two years later Westcott gave the securities in question to Carter, see (Rec., 391).

The Circuit Court held that Westcott was a partner with Greene and Gaynor, see (Rec., 387): but refused to hold that Carter had knowledge thereof, see (Rec., 382).

That the Circuit Court of Appeals was mistaken as to the contracts let after October, 1893, has been discussed hereinafter, that being the new finding of fact by that court, see *ante*, pp. 18-19.

That the "big contract" of October 22, 1892, is the main subject of controversy, see (Rec., 359; 13423).

That Carter received the securities from Westcott in October, 1897, see decree (Rec., 391, *et seq.*)

That Carter received those securities in the law office of Elihu Root supposing he was receiving his wife's share of her father's estate, see (Rec., 6278 and 8882).

That the contracts were let on public "bids" as required by law, see the findings of the courts (Rec., 364; 368; 13425, etc.).

That the contract was let to the "lowest bidders," see opinion (Rec., 13423).

That the contract was approved by the Chief of Engineers, see the contract itself (Rec., 10173). See also finding of the court (Rec., 13423).

That the contracts were fully performed, the contractors using in each square yard of mattress paid for even "more material than was required by the contract," see (Rec., 378).

That the work was done according to the terms of the contract, see the opinions of both courts. (Rec., 378-9; 13425.)

That the contract was "fairly obtained," see the finding of the court. (Rec., 13426).

That the "specifications" were right, see the finding of the court (Rec., 13425).

That the "advertising for bids" was right, see the finding of the court (Rec., 13425).

That the "treatment of proposed bidders" was right, see the finding of the court (Rec., 13425).

That the methods of "letting contracts" was right, see the finding of the court (Rec., 13425).

That Carter believed the terms of the contract to be "reasonable when made," see the finding of the court (Rec., 13426).

That no conspiracy is "established by direct evidence," see the finding of the court (Rec., 13425).

That Carter's discretion was properly exercised in "extending the mattress work;" and "omitting other work," see finding of court (Rec., 13426).

That the changes Carter made were "effective for a great work," see finding of the court (Rec., 13423).

That the work was "a triumph of engineering skill," see the finding of the court (Rec., 359).

That the defendant proved the prices to be the fair and usual prices for such work has been shown hereinbefore. See *ante,* pp. 6-9.

That Carter reported the increase of mattress work to his superiors, see finding of the court (Rec., 369).

That the evidence introduced by the complainant was largely false, see the Appendix hereto entitled "The Witnesses and their Testimony."

That every allegation made by the complainant in the bill of complaint as the basis of the alleged conspiracy was found to be false by both courts, see the volume filed herewith entitled "Bill of Complaint, Findings of the Courts, and References to the Evidence."

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

No. 552.

OBERLIN M. CARTER ET AL., CROSS-APPELLANTS,

vs.

UNITED STATES OF AMERICA, CROSS-APPELLEE.

THE WITNESSES AND THEIR TESTIMONY.

MR. J. B. FORAKER,
Solicitor for Oberlin M. Carter.

MR. J. B. DAISH,
Associate Counsel.

DECEMBER 17, 1909.

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ABBREVIATIONS.

Art. War.—Articles of War.
B. E.—Board of Engineers' Record.
Bix.—Printed testimony of Col. W. H. Bixby.
C. M.—Court Martial Record.
Def. Ex.—Defendant's Exhibit.
Ex.—Complainant's Exhibit.
Hew.—Hewlett Record, Volumes I and II.
McP.—Printed testimony of Charles McPherson.
Man. Ct. Mar.—Manual for Courts Martial.
N.—Printed testimony of Robert Nelson.
N. Y.—New York Record; Removal Proceedings.
Par.—Parsons' Record.
Rec.—Official Record.
Rep.—Report.
Wy.—Wynne Record.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

No. 552.

OBERLIN M. CARTER *et al.*, *Cross-Appellants*,
vs.
UNITED STATES OF AMERICA, *Cross-Appellee*.

THE WITNESSES AND THEIR TESTIMONY.

Two hundred and thirty-nine* witnesses testify in this case. Of these, ninety-one testify in relation to the money matters, and the remaining one hundred and forty-eight testify in relation to the engineering work which is in issue herein.

WITNESSES ON THE MONEY MATTERS.

Of the ninety-one witnesses who testify in relation to the money matters, seventy-five testify on behalf of the complainant, and the remaining sixteen testify on behalf of the defendant.

COMPLAINANT'S WITNESSES.

Of the seventy-five witnesses who testify on behalf of the complainant in relation to the money matters, five will be classed among the witnesses for the defense, because their testimony favors the defendant.

These five witnesses are as follows:

FLAGG, W. H.
REED, J. H.
STIMSON, H. L.
VAN DEVENTER, C. H.
WESTCOTT, R. E.

Fifty-seven witnesses simply produced such copies of books of record, or account, etc., as were asked for by the complainant, knowing nothing whatever of the case of their own knowledge.

These fifty-seven witnesses (who are bankers, brokers, clerks, or other officers or employés of financial institutions, railways, safe deposit companies, etc., all of whom admittedly know nothing of the issues involved in this case, and who simply produced books, papers,

*Fifty-two other witnesses testified before the Board of Engineers and the court martial; but their testimony is immaterial, and has not been introduced in these suits by either side.

etc., or gave copies of such information of record in their respective offices as the complainant's solicitor desired to introduce in this cae) are as follows:

Baskerville, T. H. (Rec., 4615-27, 4717, 4917).
Bloodworth, F .D. (Rec., 4649-50).
Bowers, J. M. (Rec., 4627-30).
Bradhurst, H. M. (Rec., 4641).
Bragg, J. F. (Rec., 4650).
Bromley, E. P. (Rec., 12065-67).
Browx, J. T. (Rec., 2366).
Burns, Edward (Rec., 2369-74).
Cathcart, Charles (Rec., 4656).
Catherwood, D. K. (Rec., 5098, 10971-92).
Chambers, F. F. (Rec., 12078-79).
Clarke, Dumont (Rec., 2368-69).
Cosens, G. A. (Rec., 5098-99).
De Guiscard, A. K. (Rec., 4655, 5156, 8885-88, 11069-88).
Devereaux, E. M. (Rec., 4646).
Dickinson, J. L. (Rec., 5059).
Duxlov, W. S. (Rec., 12076).
Erland, E. M. (Rec., 4647-48).
Farley, J. J. (Rec., 12053-59).
Ferry, C. B. (Rec., 4649).
Garcia, C. S. (Rec., 4656).
Gibson, G. R. (Rec., 11045-50).
Gordon, Beirne (Rec., 6205-07).
Hartshorne, T. W. (Rec., 4644, 5098, 6284, 6447, 7939, 1108).
Hoyt, F. W. (Rec., 10960-70).
Hutchinson, Walter W. P. (Rec., 5156-57, 5333-35).
Jordan, C. N. (Rec., 1059-81, 2317-23, 2360-66).
Judd, O. R. (Rec., 4648, 11051-58).
Kain, Francis (Rec., 11032-34, 11345-46).
Lane, M. B. (Rec., 4657).
Lilly, E. B. (Rec., 4648).
McNary, G. C. S. (Rec., 12043-52).
McNeil, A. T. (Rec., 4645).
Melvin, Edwin (Rec., 12082-83).
Montgomery, H. F. (Rec., 4644-45).
Morris, John (Rec., 10953-55).
Millett, S. C. (Rec., 4642).
Mitchell, W. A. (Rec., 4651-52, 6201-06).
Nevins, David (Rec., 12035-42).
Northcott, G. A. (Rec., 4653-54).
O'Gorman, John (Rec., 10956-59).
O'Hara, R. D. (Rec., 4642).
Paulsen, J. F. (Rec., 2018-43, 2044-45).
Penton, W. C. (Rec., 4645).
Roades, Lyman (Rec., 4651).

ROBINSON, J. F. (Rec., 12068-72).
SAGE, W. G. (Rec., 4648-49).
SANDS, B. A. (Rec., 4605-14).
SMITH, F. M. (Rec., 11337-44).
SMITH, W. H. (Rec., 4642-44).
SNYDER, A. D. (Rec., 4645-46).
TIEDEMANN, GEORGE (Rec., 12080-81).
TURNEY, J. A. (Rec., 4645).
UNDERWOOD, J. T. (Rec., 12073-75).
VAN LOAN, ZELAH (Rec., 12060-64).
WEEKS, G. D. (Rec., 4651).
WICHMANN, T. W. (Rec., 4652).

Four more witnesses simply identified the private papers of Captain Carter, which had been seized by military force in the fall of 1897, knowing nothing whatever of the case of their own knowledge.

Those four witnesses are as follows:

ADAMS, H. M., Major of Engineers (Rec., 2401).
CLOUS, J. W., Judge Advocate (Rec., 10931).
GILLESPIE, G. L., Colonel of Engineers (Rec., 2100; Rec., 10727).
MCCLURE, CHARLES, Captain of Infantry (Rec., 10936; Rec., 8888).

Of the remaining nine witnesses for the complainant on the money matters, one witness (MARION ERWIN, Rec., 8927) testified simply that he could not get a witness he said he wanted; one witness (ROBERT MACLAY, Rec., 913) declined to testify at all, because he was not served with a subpœna; one witness (E. W. V. ROSSITER, Rec., 8925) testified simply that he was not aware Robert F. Westcott had received large sums of money from Cornelius Vanderbilt in the years 1893-1895; two witnesses (W. H. BELCHER and H. DE W. DOBBS, Rec., 8854-56) testified simply that they had bought real estate in Orange, New Jersey, from Westcott, and stated the mode of payment therefor, which admittedly had nothing to do with Carter; one witness (F. P. SOLLEY, Rec., 8877) testified with regard to the delivery of securities, which are now in court, from Robert F. Westcott to Oberlin M. Carter, October 29, 1897, saying he was not present when that transfer took place.

This leaves three witnesses for the complainant on the money matters, viz: Thomas F. Barr, D. N. Carvalho, and E. I. Johnson.

THOMAS F. BARR (Rec., 8856; Rec., 10942). This witness was the judge advocate against Captain Carter before the court martial (Rec., 10942).

(*a*) The military law required Barr to present both sides of the case impartially before the court martial:

> "§ 8. Throughout the trial the judge advocate should do his utmost to present the whole truth of the matter in question. He should oppose every attempt to suppress facts,

or to torture them into false shapes, to the end that the evidence may so exhibit the case that the court may render impartial justice." (Man. Ct. Mar. 24.)

"He is to use no undue means to secure the conviction rather than the acquittal of the accused." (O'Brien, Mil. Law, 284.)

Barr, however, was a rabid partisan for the prosecution, and before the trial was ended, he actually admitted in open court that he had taken *"the position of prosecution in this case,"* and was *"simply prosecuting"* Captain Carter (C. M., 2072-73).

The military law also made Barr, who was *"simply prosecuting"* Captain Carter, the legal adviser of the court martial for *both sides:*

"§ 6. While the court is in open session, the judge advocate should respectfully call the attention of the court to any illegalities in its action, and to any irregularities in its proceedings. He should act as legal adviser of the court so far as to give his opinion upon any point of law arising during the trial, when it is asked for by the court, but not otherwise." (Man. Ct. Mar. 24.)

"Whenever his opinion is demanded by the court, he is bound to give it freely and candidly, and even when not demanded, it is his duty in every case to caution the court against any violation of material justice." (Benét, Mil. Law, 201.)

"While the judge advocate is excluded from all right to dictate opinions or sentences to a court, it is on the other hand his particular province to give counsel or advice." (De Hart, Mil. Law, 325.)

"He is bound to furnish his opinion on any question of law, practice or procedure, arising in the course of the trial, when the same is required of him by the court" (1 Winthrop, Mil. Law, 286).

"A judge advocate may be said to be the main-spring of a court martial, for on him the court depends for information concerning the legality, as well as regularity, of their proceedings; if then he errs, all may go wrong."

(Adye, Mil. Law, p. 110.)

(*b*) Barr is used by the complainant in the present suits for the purpose of trying to discredit important pencil memoranda existing on the private papers of Carter, which were seized by military force in 1897.

The question of Barr's memory and recklessness in testifying is therefore of importance.

Barr testifies in two diametrically contrary ways. In 1900, Barr testified that he never examined those papers at all; in 1905, he

testified that he did examine them in 1898, and that he did not then see the pencil memoranda which are on them now.

(*c*) Two large boxes, containing all the private papers of Captain Carter which had been in the possession of the Board of Engineers, were turned over to Barr, and shortly after the court martial convened in January, 1898, Barr opened those two boxes in the presence of Carter and his counsel. (Rec., 10943.) Barr testified that those boxes contained "a vast number" of papers (Rec., 10947); Barr further testified that, "during one day's session (Rec., 8874), and in the presence of Carter and his counsel, he picked out and kept such packages or papers as "I thought I could make use of in the prosecution" (Rec., 8874); that "a great many" of those papers "were put one side," and then "placed in one of those boxes," which was "screwed up" and "the screws sealed," and, without ever being opened by him, that box of papers was finally "turned over to the accused through his counsel." (Rec., 10944.)

Barr further testified he "never opened" those boxes containing Carter's private papers, and "did not know" anything "of the contents," prior to opening them as aforesaid on January 17, 1898, in the presence of Carter and his counsel; and that he never broke the seals of the box containing the papers he set aside on that day, and afterwards returned to Carter. (Rec., 8874.)

(*d*) On July 18, 1900, *i. e.*, about two years after Barr had taken out of Carter's private papers those which he wanted to use against him, and had returned the rest, and when his memory was still fresh on the subject, Barr testified specifically that he never examined those papers he turned over to Carter's counsel in 1898, testifying of those particular papers, *"those I have not examined."* (Rec., 10947.) Barr testified further, in 1900, that he did not look into the papers he turned over to Carter's counsel in 1898 at all, but that he "judged hurriedly the *probable* contents and nature" of those papers, simply *"from the outside wrapper."* (Rec., 10947.) When Barr was asked, in 1900, whether any one could possibly carry the contents of one of the boxes of Carter's private papers in his mind, so as to be able to tell whether there had "been some changes made in some one of those papers," Barr testified: *"I think that is beyond the capacity of the human intellect."* (Rec., 10949.)

When it was learned by the complainant, in 1905, that on some of the papers turned over to Carter's counsel in 1898 (and which Barr swore in 1900 *"I have not examined"*), there were pencil memoranda, which would be of great use in determining the truth in this case, and that those memoranda were fatal to the contentions of the complainant, this same man Barr, who was *"simply prosecuting"* Captain Carter before the court martial, was so anxious to sustain the position he had taken before that tribunal, that he went back to the witness stand in December, 1905, and then *swore diametrically contrary to what he had sworn five years before;* and Barr testified, in 1905, that before he turned Carter's private papers over in 1898,

he made "a careful examination of all the papers" which he "turned over" (Rec., 8860); and he swore further that he made "such a careful examination of the papers turned over as would have enabled" him, in his judgment, "to have seen those pencil memoranda if they had been on there at the time." (Rec., 8862.)

But on cross-examination, this same Barr, who was willing to swear one way in 1900, *and then to swear to the exact contrary in* 1905, *was forced to admit that he had no "recollection one way or the other" whether or not there were. "among the papers of Captain Carter, any considerable number of papers or letters that had pencil memoranda on the same."* (Rec., 8874.)

D. N. CARVALHO testifies only as an expert on handwriting.

An instance affecting the credibility of this witness Carvalho is given below.

Carvalho testified for the complainants, as a so-called expert on handwriting, that B. D. Greene forged an endorsement on a disbursing check issued by Carter; which check was issued in Savannah, Georgia, April 5, 1895, and was paid in New York City April 9, 1895. (Rec., 2323.)

Carvalho was then asked whether, if it were proved that B. D. Greene was in London at that time (thus making it impossible for Greene to have written that endorsement), he would change his testimony, and he answered "No, sir." (Rec., 2394.)

It was then proved beyond a doubt that B. D. Greene was in London on April 5, 1895, the very day on which that check was drawn in Savannah, Georgia; that Greene sailed from Liverpool, April 6, 1895, on the *S. S. Lucania*, and that Greene did not reach New York until April 13, 1895, which was *four days after that endorsement was written and the check paid;* and that Carvalho's sworn testimony was "expert" perjury. (Rec., 2450.)

E. I. JOHNSON (Rec., 5105). This witness is practically the sole witness for the complainant, on the money matters involved in this case. Johnson admits he knows nothing whatever of any of the matters in issue, of his own knowledge, and he testifies simply as a so-called expert accountant, who has been in the pay of the complainant, and engaged on this case, for about ten years.

The testimony and "Exhibits" of this witness are considered in detail in the main brief, wherein are given analyses of Johnson's principal testimony and "Exhibits" in this case, and to which reference is here made. The Circuit Court found Johnson's sworn statements to consist of "forced balances" and "strained conclusions" (Rec., 380).

DEFENDANT'S WITNESSES.

Sixteen witnesses testify on behalf of the defendant concerning the money matters in issue herein. In addition to those, five more witnesses, who were called by and testified at the instance of the

complainant, will be classed among the defendant's witnesses, because they testified substantially in favor of the defense.

Those five witnesses for the complainant, who are classed among the witnesses for the defense, are as follows:

FLAGG, W. H.
REED, J. H.
STIMSON, H. L.
VAN DEVENTER, C. H.
WESTCOTT, R. E.

Of the twenty-one witnesses, who thus testify in favor of the defendant, one witness (J. E. CHANDLER, Rec., 2451) testifies concerning the Empire Construction Company, etc.; one witness (W. W. MACKALL, Rec., 3280) testifies concerning the Hunting Island Land Company, stating that the investment in that company was made on behalf of Robert F. Westcott; one witness (W. W. HEGEMAN, Rec., 3113) testifies that Carter's proposed connection with railway contracts had nothing to do with Greene and Gaynor; one witness (E. R. CORSON, Rec., 3212) testifies concerning Carter's style of living, before and after he married the daughter of the millionaire, Robert F. Westcott, saying that, before Carter married Westcott's daughter, he lived simply, and on his army pay; one witness (I. S. CARTER, Rec., 3495) testifies to being present when Westcott gave $7,500 in currency to Carter, March 14, 1893; one witness (SENATOR C. M. DEPEW, Rec., 2405) testifies concerning Westcott's connection with the Vanderbilts, and that Westcott was a man of wealth, etc.; one witness (G. E. ZIPPEL, Rec., 3317) testifies that Westcott told him he had unbounded confidence in the integrity of Carter, and that he had given Carter a power of attorney to transact his business while he (Westcott) was in Europe. This witness testifies he had been the private secretary of Westcott, and had known him intimately all his life.

The remaining fourteen witnesses on the money matters testify to facts which prove that the securities Robert F. Westcott gave to Carter in October, 1897, belonged to Westcott, and not to Carter.

The names of those fourteen witnesses for the defendant are as follows:

(1) O. M. CARTER (Wy. 367). The witness is the principal defendant in this case. Carter testifies that he never, at any time, either directly or indirectly, received one penny from Greene and Gaynor (the contractors who did work under his supervision), and that he never contemplated having any relations with them, from which he was to derive any profit or benefit whatever. Carter testifies that every dollar he possessed—(outside of his army pay, and such fees for consulting engineering work as he was permitted to do by the Chief of Engineers)—was received as the inheritance of his deceased wife, or as gifts from his father-in-law, Robert F. Westcott, who had practically adopted him as his own son. Carter further testifies that if his father-in-law, Robert F. Westcott, ever had any interest in any of Greene and Gaynor's contracts, he (Carter) never knew or even suspected it.

Carter submits accounts (Defendant's Exhibits 96-A to 96-G, inclusive), which show where he got every dollar he ever had, or ever spent, during the years in which it is alleged he had improper relations with Greene and Gaynor, and those accounts balance to a cent, and show that not one penny ever came from Greene and Gaynor.

Carter has also been listed as a witness on page 27.

(2) JOHN F. GAYNOR (Rec., 929). This witness was a partner of B. D. Greene, and had contracts with the United States for work at and near Savannah.

Gaynor testifies he never gave to Carter, either directly or indirectly, any money or other valuable thing, and that he never had any interest with Carter in any enterprise of any kind, from which they (or either of them) were to derive, or ever did derive, any profit or gain.

(3) B. D. GREENE (Rec., 3665; Rec., 882). This witness had formerly been a Captain of the United States Engineers. Greene was a partner of John F. Gaynor. Greene testifies positively that neither he, nor anyone connected with him, ever paid any money or other thing of value to Carter, either directly or indirectly, and that neither he, nor anyone for him, or connected with him, ever had any interest in any enterprise of any kind whereby Carter was to derive (or ever did derive) any profit or gain whatever.

(4) HENRY L. STIMSON (Rec., 8881). This witness (who was called by the complainant) was a law partner of Hon. Elihu Root, and was attorney for Robert F. Westcott in October, 1897. His testimony is considered of great importance to the defendant.

Stimson testifies that when Carter was on trial in New York in October, 1897, charged with having spent more money than his army pay (the suspicion being that he got that money from Greene and Gaynor), he (Stimson), as Westcott's attorney, prepared the legal papers which were used in the transfer of the bonds, etc., which Robert F. Westcott gave to Carter on October 29, 1897, and which are now in court.

Stimson further testifies that, in the law office of Elihu Root, on October 29, 1897, Westcott delivered those bonds, etc., to Carter in the presence of Carter and of his attorney, A. J. Rose; and in the presence of Westcott and of himself; and that Carter signed written receipts for these securities, describing them by number and in detail.

There is not the slightest intimation in Stimson's testimony that this transfer was anything more than a transfer from father to son, or that it was in any way improper, or that it was in any way secret; in fact, Stimson had never seen Carter prior to that day, and had first met Westcott less than a week before.

Nor is there the slightest intimation in Stimson's testimony that the securities belonged to Carter, and that he was so anxious to get them that he was willing to sign receipts for them, in the presence of strangers, while he was on trial for having more money than his

army pay. On the contrary, Stimson testifies that, after Westcott had given these securities to Carter, and Carter had receipted for them, Carter then and there offered to return a part or all of them to Westcott.

(5) A. J. Rose (Rec., 4692). This witness was the attorney for Captain Carter, who employed him at the instance of Robert F. Westcott. Rose assisted Henry L. Stimson in preparing the papers by means of which Westcott made his gifts to Carter on October 29, 1897, and was present in Elihu Root's law office when Carter received the securities and receipted for them. Rose testified about a letter written by Westcott to Carter, in which Westcott acknowledged he owned the securities he gave to Carter. (Rec., 4692.)

(6) R. E. Westcott (Rec., 3288). This witness (who also testified at the instance of the complainant) is a brother-in-law of Carter, and a son of Robert F. Westcott.

R. E. Westcott testifies his father told him he had never transacted any business for Carter, as the complainant now contends he did, but that his father told him the only business matters which had ever existed between him and Carter was the business Carter had transacted for him (Westcott).

R. E. Westcott also testifies that his father gave money to Carter, or to Carter's wife.

(7) R. W. Tailer (Rec., 4155). This witness is a capitalist of New York, who was an intimate friend of Robert F. Westcott. Tailer testifies that Westcott came to him, after Westcott got back from Europe, and told him that he (Westcott) was dissatisfied with Carter for having bought some Lackawanna and some Delaware & Hudson stock for him (Westcott) during his absence abroad. Notwithstanding that uncontradicted testimony of Tailer, the complainant now contends that this stock belonged to Carter.

(8) E. Luther Hamilton (Rec., 4684). This witness is a lawyer of New York, who testifies he had been the intimate friend and legal adviser of Robert F. Westcott for many years.

Hamilton testifies that Westcott consulted with him concerning the investment of a large amount of the moneys which the complainant now contends belonged to Carter; and Hamilton testifies that Westcott proposed to invest that money for himself, and that Westcott proposed to invest it in real estate, in his wife's name.

Hamilton also testifies that, during all the years of his intimate association with Robert F. Westcott, in consultation with regard to his investments, etc., he never received a hint or suggestion that the money which the complainant now contends belonged to Carter, belonged to anyone except Robert F. Westcott.

(9) J. H. Judge (Rec., 4679). This witness is a lawyer of New York, who testifies that, in 1893, Robert F. Westcott bought from him, as receiver, certain real estate in New York. Westcott drew checks to pay for that real estate, out of money the complainant now contends belonged to Carter, yet Judge testifies that Westcott bought that property for himself. Judge testifies that although the transac-

tion was a *bona fide* purchase by Westcott, and although Westcott drew a check to him to pay for that property, the money went back to Westcott, and the title to that property did not finally pass to Westcott, on account of some legal trouble relating to possession, etc.; but Judge testifies that Westcott actually made the purchase for himself as aforesaid.

(10) W. H. Flagg (Rec., 2374; Rec., 11059). This witness (who was also a witness for the complainant) was a member of the firm of Reed & Flagg, who were brokers for Robert F. Westcott. Through Reed & Flagg were purchased by Westcott most of the stocks and bonds which are in court, the remainder having been bought through Van Deventer by Westcott, except 15 bonds coming from the estate of Carter's wife, which Carter bought.

Flagg testifies as to these securities (which the complainant now contends were bought by Carter), that Carter never had a single transaction with his firm, except as a representative of Robert F. Westcott, and that every transaction, concerning any of the securities now in court, wherein Carter appeared, was by and on behalf of Robert F. Westcott. Flagg testifies he knew this from conversations he had with Westcott, at the time of the purchase of the securities in question, as well as subsequent thereto; and Flagg testifies further that Westcott said he was dissatisfied with some of the purchases Carter had made for him (Westcott) when he was abroad, but that Westcott nevertheless ratified those purchases, and acknowledged them as his own.

(11) J. H. Reed (Rec., 888). This witness (who was a partner of W. H. Flagg) was called by the complainant, unknown to Carter, and testified in Carter's absence, and unknown to him.

Reed's testimony was entirely in favor of Carter, and was utterly destructive of the claims of the complainant, because Reed testified that he was Westcott's "confidential friend," and knew the transactions Carter had with his firm were entirely and solely on behalf of Westcott. *That testimony, which Mr. Reed gave in Carter's favor, was suppressed, and Carter never saw it until after the present suits were begun.*

Reed testifies he was the broker and intimate friend of Westcott, saying, "There could be no greater intimacy between any two families than existed between mine and his. I think I may say I was his confidential friend." Through Reed and Flagg were purchased by Robert F. Westcott most of the stocks and bonds which are in court. Reed testifies positively that Carter never had a transaction of any kind with his firm, except as the agent of Westcott, and Reed testifies positively that every transaction, which relates to any of the securities in court (and which the complainant now contends were bought by Carter), was for and on behalf of Robert F. Westcott.

(12) C. H. Van Deventer (Rec., 11035, 5098.) This witness (who was the broker and former partner of Robert F. Westcott) testified at the instance of the complainant. Through Van Deventer were purchased by Westcott nearly one-third of the bonds which are

now in court. Van Deventer testifies that all of the bonds now in court, which were bought by him in the name of Westcott, were bought by Westcott himself, and *were bought for Westcott, and were delivered by him to Westcott, "and not to anyone else."*

(13) CHARLES MCPHERSON (Rec., 6599). This witness is an expert accountant of Detroit, who testifies he has examined into all of the evidence on which the witness Johnson swears he bases his testimony, *i. e.*, Johnson's Exhibits 319, 589 and 590, etc.

McPherson testifies that Johnson's testimony and exhibits are false and misleading, and he also testifies that Carter's accounts, which show his money all came from Westcott, are correct. McPherson testifies there is no evidence, oral or documentary, showing that Carter ever got any money whatever from Greene and Gaynor; and McPherson further testifies that the evidence shows every dollar Carter received came to him from his father-in-law, Robert F. Westcott, and that the evidence further shows the money belonged to Westcott, and not to Carter.

McPherson testifies further that the account of Carter, as attorney for Westcott, in 1895-'96, was properly and honestly kept; and the account was kept just as Carter says it was; and that the account was Westcott's, and not Carter's, as the complainant now contends it was.

(14) ROBERT NELSON (Rec., 7813). This witness is an expert accountant, who is vice-president and manager of the International Audit Company of Chicago.

Nelson testifies he has examined much of the evidence on which Johnson swears he bases his testimony against Carter, *i. e.*, Johnson's Exhibits 319, 589, 590, etc. Nelson testifies that Johnson's testimony, as contained in those Exhibits 319, 589 and 590, is utterly false and misleading; that Johnson has made forced balances, has introduced false and fictitious items, etc., etc., and that no reliance whatever can be put on Johnson's testimony. Nelson also testifies he has examined McPherson's testimony relating to the accounts, and that it is correct.

Nelson testifies he has examined the accounts of Carter, which show the moneys Carter possessed came from and belonged to his father-in-law, Robert F. Westcott, and Nelson testifies those accounts of Carter are correct, and show the transactions as they actually existed at the time. Nelson further testifies he has examined the account of Carter, as attorney for Westcott; that the account was Westcott's, and was kept as Carter says it was; and that Carter's method of keeping that account was a perfectly honest and proper method of keeping such an account.

WITNESSES ON THE WORK.

One hundred and forty-eight witnesses testify in relation to matters connected with the engineering work which is in issue in this case.

Of the one hundred and forty-eight witnesses on the work, thirty-six are civil engineers, eighteen of whom are officers of the United States Engineers; nineteen more are contractors; seventeen more are employés of contractors; while the remaining seventy-six witnesses come from many varied walks of life. These one hundred and forty-eight witnesses will be divided into three classes, viz.: Engineers; contractors and employés; miscellaneous.

Engineers.

Thirty-six civil and military engineers testify in this case. Of these, seven testify in favor of the complainant, and twenty-nine testify in favor of the defendant. Of those twenty-nine witnesses, three were summoned by the Government, but as their testimony favors the defendant, they will be classed among the witnesses for the defense.

Complainant's Witnesses.

The names of the seven engineers who testify in favor of the complainant are as follows:

(1) Major C. E. Gillette (Rec., 1095, 441, 10492). This officer (who preferred the charges against Carter) was forced to admit that, when he preferred those charges, he had had no experience whatever in work such as Carter had done. Gillette admittedly knows nothing of Carter's work, of his own knowledge, but he contends Carter's work was not executed properly; that Carter ought to have used military fascines; that he ought to have required the contractors to sink the rafts or mattresses one at a time, etc., etc.

Gillette was a captain of engineers, junior in rank to Captain Carter, whom he succeeded in charge of the works of river and harbor improvement at Savannah, Georgia, July 20, 1897. (Rec., 1095.)

The harbor work at Savannah (exclusive of the stone put on top) had been done for forty years, either with saw logs, or with brush tied into round logs, just like a saw log, and called "fascines." (Rec., 7998-99, 8135-37, 8434-35.) Those fascines (or brush logs) were sometimes made into rafts, and then they were called "mattresses." (Rec., 8091-93, 8434.)

Loose brush was never used, except to cover saw log rafts, so that the stone thrown on the rafts would stay there. (Rec., 8091.)

No loose brush was ever used in any of the work which is in controversy herein. (Rec., 8137-38.)

Gillette admitted before the court martial, in 1898, that his total experience, in using any kind of brush in harbor work, was limited to about 12,000 cubic yards of brush, put in on the Pacific coast. (Rec., 1123, 8150-52.)

This is about the amount of brush Carter used at Savannah every week, and at the rate Gillette claims brush was worth, *i. e.*, about

fifty cents per cubic yard (Rec., 4460), the brush work done by Gillette would cost about $6,000.

Gillette's total experience (according to his own statements) with saw-log mattresses, and with brush-log mattresses (of which he had none), and with all other kinds of brush in harbor work, was hence only about $6,000 altogether.

Gillette is the only United States engineer officer who testified against Carter on any important detail of the work. (Rec., 8161, 8231, 8328.)

Gillette admitted on the witness stand that he had never seen a saw-log mattress, at the time he caused Carter's arrest for not using saw-log mattresses in the Savannah work. (Rec., 10796, 1123, 8151.)

Gillette also admitted on the witness stand that up to the time he succeeded Carter at Savannah in July, 1897, he had never even seen a brush fascine mattress, such as Carter had used with such great success under the big contract. (Rec., 1123, 8151, 8320.)

Gillette, with only $6,000 of experience on the Pacific Coast, and admitting as he did that he had had no experience whatever on the Atlantic Coast, thereupon undertook to criticise $2,000,000 worth of work, done under the "big contract" at Savannah, which work was such a great success that General Craighill, the Chief of Engineers, testified in this case: *"It is one of the most successful operations of which I have any knowledge, either in this or in any country."* (Rec., 3424.)

Gillette never saw the Savannah work, done under Carter, until after it was completed (Rec., 1095, 1123, 4178), hence his testimony is purely theoretical.

Further than this, Gillette's criticisms of Carter's work are directed toward cost and minor details of construction, for Gillette expressly admits Carter's work was a success, saying:

"There is no doubt that the depth of water that you claim has been obtained in Savannah Harbor. *I have no engineering objections to any of the mattresses that have been put in."* (Rec., 676.)

Not only was Gillette without any material experience in such work, and utterly without any knowledge with regard to the work done under Carter, but when questioned as to whether he had ever investigated into Carter's work, after Carter left Savannah and he reached there, Gillette admitted he had never investigated the work itself, as it was practically all under water (Rec., 1122), and that *he had never even read the official reports on the work* (Rec., 4177); that to him they were *"difficult to understand"*; and that the details of the work made him *"tired out."* (Rec. 4178.) He even boasted that he had never asked any explanation about the work from Carter, because "I didn't consider I needed any." (Rec., 1136.)

The work done under the big contract at Savannah was nearly all done with "fascine mattresses." (Rec., 8137.) Gillette arrived at Savannah, July 20, 1897. (Rec., 1095.) The first fascine mattress Gillette ever saw was on July 26, 1897, at Cumberland Sound, which

he testifies *"was a new thing to me entirely."* Yet, with only $6,000 of experience, and with no knowledge of Carter's work, Gillette promptly condemned such fascine mattresses as "not at all as *I* understood the specifications" (Rec. 10874), and he at once *"found things all wrong, terribly wrong, to my mind."* (Rec., 643.)

Gillette did not pretend to testify of his own knowledge concerning any of Carter's work (Rec., 1123); hence his opinions concerning that work, of which he admitted he was utterly ignorant (Rec., 4178), must be simply in the nature of "assistance to the court," by a man with only $6,000 of experience, involving the engineering and other technical matters which arise in this case, concerning work which cost more than $2,000,000.

In view of this fact, it is of the utmost importance, first, to examine carefully into the statements with which Gillette pretends to "assist the court." so as to determine whether those statements are fair and honest, or whether they are unfair and dishonest, and were made for the purpose of deceiving and misleading the court.

Some of Gillette's statements to the court, etc., have already been considered in the main brief, to which reference is here made. See also References to the Evidence, p. 510.

(2) Gen. P. C. Hains (Rec., 681). This officer was Carter's Division Engineer, whose duty it was to inspect Carter's work, to direct its execution, etc., and who, a few days after testifying against Carter, was given Carter's place on the Nicaragua Canal Commission. (Rec., 8327.) The testimony of Hains is practically that he paid no attention whatever to his duties, and did not see any of Carter's work, or know what Carter was doing, but that, after listening to Gillette and his employés, he (Hains) thinks Carter's work was improperly done, etc.

The weight to be given to any testimony of Hains can be determined by considering the following:

Hains was a Colonel of Engineers. He was the Division Engineer in charge of Carter's district during the 1896 contracts. He was Carter's immediate superior officer. (Rec., 681.) He was required by the Engineer Regulations to examine, alter, and then approve all plans and specifications for contract work in Carter's district, and he was further required to inspect the execution of that work, and to direct Carter (who was the district officer) in all matters pertaining to that work.

(*a*) Hains changed and then approved Carter's proposed specifications (Rec., 712); he admitted he inspected Carter's work (Rec., 734); he passed that work as having been done in accordance with the contract (Rec., 682); and he required Carter to report to him in writing every month the details of all work done, giving its character, location, amount, etc., which Carter did. (Rec., 688, 8762, 8709-11.)

(*b*) Hains testified that he did not know anything about Carter's work, as the Engineer Regulations required he should.

A few days after thus testifying, Hains was given Carter's place as military engineer of the Nicaragua Canal Commission. (Rec., 8327.)

(*c*) Hains testifies that (in his opinion) the kind of mattress Carter had accepted was cheaper to the contractors than the other two kinds described in the specifications (Rec., 682), and that it was not in accordance with the contract (Rec., 687); yet Hains admitted he did not know anything about this matter himself, saying, "*I am not familiar with it.*" (Rec., 460.) He admitted further that he got his only information from Gillette's "assistants." (Rec., 682.)

(*d*) Hains also testifies, in effect, that (in his opinion), when Carter had used as much brush as he had estimated beforehand he might use, he ought to have stopped the work.

Instead of stopping the work, Carter went ahead and reported in writing every month, both to the Chief of Engineers and to the division engineer, that he was going ahead with the work, and was continuing to use brush. (Rec., 688.)

Carter made those written reports in the exact form ordered by the Chief of Engineers, but Hains testified that he (Hains) did not pay enough attention to the reports to know what Carter was doing. (Rec., 688.) When Hains was asked the object of those reports, he took refuge by saying, "*I don't know as it was necessary for me to answer that question.*" (Rec., 688.)

(*e*) Hains also testifies that (in his opinion) the price of $1.10 a square yard for brush mattresses, in the contract Carter had been ordered to make with Greene and Gaynor, "was excessive." (Rec., 682.) When it was shown that, only the year before, Hains himself had signed a written report estimating the cost of those same brush mattresses, at that very locality, at $1 a square yard (Rec., 690), Hains then said he did not understand his estimate was for the kind of mattress which was actually used. (Rec., 691.) *He was then asked what kind of a mattress he did have in mind, when he estimated its cost at* $1 *a square yard, and he said he did not have any type at all in mind, but thought it would be whatever kind of a mattress the engineer chose to use "when he came to the construction."* (Rec., 720.)

(*f*) Hains further testified that the specifications, for the 1896 contracts with Greene and Gaynor, had not been approved by him (Hains) (Rec., 709); *yet his own written report, in his own handwriting, which is now in evidence, shows that he did approve them* (***after altering them to suit himself***), *and that he actually said in writing, in his approval, "These papers now seem to be all right."* (Rec., 712.)

(3) Major F. V. Abbot (Rec., 2569, 8900, 811). This officer had been for some years in charge of the harbor work at Charleston, S. C. His principal testimony is favorable to the defendant. Abbot testifies that he thinks contractors might not understand the

term "specific gravity," which were used in the specifications for stone, which were approved by the Chief of Engineers; but Abbot testifies in Carter's favor that Carter's three mattress designs all cost the same per square yard; that Carter did perfectly right in increasing the amount of brush beyond that originally estimated, etc.

(4) MAJOR W. M. BLACK (Rec., 692, 2534). This officer had been at one time in charge of harbor work on the Atlantic Coast of Florida. His principal testimony is favorable to the defendant. Black testifies he does not believe in the use of many brush mattresses on ocean bar work, but admits that the Board of Engineers, which prepared the project for Carter's work (and of which he was a member), overruled him.

Black testifies in Carter's favor that the brush mattresses, which Carter used, cost more than the log mattresses, which were not used; that the price of $1.10 per square yard, paid by Carter for mattresses at Cumberland Sound, is reasonable, etc.

(5) J. H. BACON (Rec., 4374). This civil engineer was in the employ (and under the orders) of Gillette when he testified. Bacon testifies that he made a comparison of the work done at Cumberland Sound under Carter and under Gillette, but admitted he gave Gillette credit for everything which went into the work, no matter whether it remained above the bottom or not; whereas, he gave Carter no credit for anything which was under the sand which had drifted up on the mattresses, when certain soundings were taken, etc.

The credibility of this witness Bacon is attached below:

Bacon was an employé of Captain Gillette and Gillette swore the drawings and computations, made by Bacon, were made under his directions. (Rec., 4466.) Bacon knew nothing of Carter's work of his own knowledge.

(*a*) Bacon swore that in 1903 he made, under the orders of Gillette, certain charts and drawings (and computations based thereon) which, in his opinion, correctly represent the work at Cumberland Sound, done under Carter from 1892 to 1897, and under Gillette from 1901 to 1902. (Rec., 4388-95.) On cross-examination, Bacon admitted that, in making his comparisons, he allowed Gillette for all material which was put in, regardless of whether it sank below the bottom or not, whereas, he did not allow Carter for anything which was below the sand. (Rec., 4475.)

(*b*) Bacon, having admitted that he allowed Carter nothing for any work which was below the original bottom (Rec., 4475), also admitted that, instead of taking the bottom on which mattresses were really sunk, as the original bottom, he simply took the depth down to the top of the sand which had drifted up against those mattresses, some three weeks after they had been sunk. (Rec., 4388.) Bacon called that the original bottom (Rec., 4388), although he knew from the official reports in the engineer office that the original bottom was many feet below the top of that drifted sand. (Rec., 1620, 8143-44, 8141-44.)

(*c*) Colonel W. H. Bixby, United States Division Engineer at Chicago, testifies (in this case) that no reliable results could be obtained from any such measurements as Bacon made under the orders of Gillette. (Rec., 8461, 8143-44, 8148.)

(*d*) Lyman E. Cooley, a prominent civil engineer of Chicago, testifies that information such as Bacon presents is "valueless." (Rec., 8549.)

(6) A. S. Cooper (Rec., 448, 1172, 10904):

This civil engineer was in the employ (and under the orders) of Gillette when he testified. Cooper testifies that he inspected about nine-tenths of all the work which is attacked, and he certified in writing (and on his honor) to Carter that it was in accordance with the contract. When Cooper came under the orders (and in the pay) of Gillette, he swore that military fascines ought to have been used—(although he admitted he did not know what a military fascine was until Gillette told him)—and he further swore he did not think Carter ought to have left out the grillage poles, which Carter replaced with the more valuable brush.

The credibility of this witness Cooper is attacked below:

Cooper was a civil engineer (outside the army) who was hired by Carter as his head assistant on the work, soon after the commencement of the work under the big contract, and who remained there until Carter left Savannah. (Rec., 1172, 1210.)

After Carter left Savannah, Gillette employed Cooper, at the Government's expense. (Rec., 1179, 1238.)

Gillette testifies as to Cooper's employment by him: "*I have had him on detective work, or something like it.*" (Rec., 4183.)

Cooper testifies that he personally inspected about "nine-tenths of the material that went into that work." (Rec., 10916.)

It was Cooper's duty, either to measure and inspect the materials that went into the work, or to have his assistant do so. (Rec., 10918.)

Cooper made written reports to Carter, as to the amount of materials that went into the work, and as to those materials being according to the contract. (Rec., 458.) Those written reports, which are all in evidence, were what Carter relied upon in making payments to Greene and Gaynor (Rec., 458-59), as Carter could not personally measure or inspect all those materials, but had to depend upon his assistants in those matters, as all engineer officers do. (Rec., 4462.)

Cooper admits he had copies of the plans and specifications for the work (Rec., 452), and that he received written instructions from Carter to see that those plans and specifications were carried out by Greene and Gaynor. (Rec., 464-65, 1201.)

Those written reports to Carter were made by Cooper on blank forms for such reports, approved by the Chief of Engineers (Rec., 458), which reports covered everything regarding the work being done by Greene and Gaynor. (Rec., 458.)

Cooper made the following written certificate at the bottom of

each of said reports, *"I certify on honor that the above report is correct."* (Rec., 458-59.)

Cooper's "detective work" (Rec., 4183) for Gillette resulted in his making two criticisms on the work done under the big contract.

As to everything else, Cooper testified that it was all right, and in accordance with the contract. (Rec., 1229.)

(*a*) Those two criticisms of Carter's work, made by Cooper, are as follows:

That military fascines ought to have been used by Carter instead of engineering fascines; although Cooper admitted he had never heard of a military fascine until after Gillette became his employer. (Rec., 462-63; Rec., 1192; Rec., 8295.)

That some of the binder poles, called "grillage" poles, were sometimes omitted. (Rec., 1229; Rec., 8057; 8334.)

The evidence shows that other materials were supplied in place of the omitted grillage poles.

(*b*) Cooper then made estimates for Gillettes as to what *he* thought the mattresses constructed by Greene and Gaynor were worth. *Those estimates of cost, of the same mattress, varied from* 70 *cents a square yard, in Cooper's first estimate of* 1897 (Rec., 1344), *down to* 9 *cents a square yard, in his subsequent testimony.* (Rec., 1176; Rec., 8322.)

(*c*) In making those various estimates, Cooper at first testified he had never seen a fascine made, and had never been in a camp where they were made, either before or during the time Carter was at Savannah. (Rec., 458-59; 464; 469.)

Later on, (as his experience as a "detective" increased), Cooper testified *exactly to the contrary*, and said he had been in the mattress camp several times (Rec., 1196); that he had seen fascines built (Rec., 1197); and that he had even built fascines himself; *but when asked where he had built them, said "I don't remember."* (Rec., 1194.)

(*d*) Cooper also testified that certain stone had a specific gravity of only 1.3. (Rec., 1182.) An expert chemist then tested that same stone, and testified that its specific gravity was really 2.56 (Rec., 2588), which was more than the contract required.

(*e*) Cooper's attitude, after he became Gillette's "detective," shows that he turned against Carter, simply to keep his job, for Cooper testifies as follows:

"Q. You obeyed orders that you knew were wrong rather than lose your place?

A. I did." (Rec., 1225.)

The Witness: I realized that if I did not do as my superior officer wished me to do, why he would get somebody that would.

Q. It was an entirely selfish interest, then, for the retention of your position that actuated you?

A. Yes, sir." (Rec., 1573; not correct.)

(7) MARION TWIGGS (Rec., 1149).

This civil engineer was in the employ (and under the orders) of Gillette when he testified. Twiggs had been Carter's assistant at Cumberland Sound, and he testified that the work done at Cumberland Sound was much better than that done at Savannah.

Twiggs certified on honor (and in writing) to Carter that the work at Cumberland Sound had been done in accordance with the contract. After coming under Gillette's orders Twiggs testified that he did not think his former reports were correct.

The credibility of this witness Twiggs is attacked below:

Marion Twiggs (who is a brother of A. J. Twiggs) was an inspector under Captain Carter. After Carter left Savannah, Gillette put Twiggs on the Government pay roll, and used him as a witness against Carter.

(*a*) Twiggs received orders from Captain Carter to see that all work was done strictly in accordance with the specifications to the contract (Rec., 1201); he testified that he inspected the work which was done (Rec., 1161); and he made written reports to Carter, certifying on his honor that all the work had been done in accordance with the specifications to the contract. (Rec., 458.)

(*b*) Twiggs told Mr. G. W. Brown (the assistant engineer whom Carter sent from Savannah to inspect the work Twiggs was supervising), that the contractors were doing better work than the contract required (Rec., 3301); he told Judge T. A. Hall of Fernandina, Florida (where the work was being done), that the work was properly done (Rec., 3348-49); he further told Mr. H. H. Linville, President of the Board of Pilot Commissioners of Fernandina, that the work was being properly done (Rec., 3351-53); and he frequently reported to Captain Carter (in writing) that the work was being properly done. (Rec., 3703; Rec., 8853.)

After Gillette put Twiggs on the Government pay roll, Twiggs testified that the work he had certified to Carter (in writing) had been properly done, had *not* been properly done (Rec., 1149), *but he said he had never told that to Carter.* (Rec., 1161.)

(c) In September, 1897, Twiggs testified that it took two men to choke the brush fascines which had been used by Carter, and he gave a written description, and a sketch, of the choker which was used. Some six months later, Twiggs swore for Gillette that the fascines, used under Carter, had not been choked at all. (Rec., 1158.)

(d) Twiggs testified that half of the stone accepted under Carter had a specific gravity of less than 2.0, whereas the contract required a specific gravity of 2.4.

Mr. B. F. Finney, an expert chemist, tested the very stone which Twiggs swore had a specific gravity of only 1.42, and found its specific gravity to be 2.56. (Rec., 2588.)

(e) Twiggs testified that Captain Carter withheld from him the prices of stone and mattresses at Cumberland Sound, and that he

did not know those prices (Rec., 1157-58); yet Twiggs made a written report (in his own handwriting), at the beginning of the work at Cumberland Sound, in which he acknowledged having received from Captain Carter in person the prices of said stone and mattresses, and *Twiggs wrote out in that report (in his own handwriting) the detailed prices of both mattresses and stone, and that report has been discovered and is now in evidence.* (Rec., 8852.)

(f) Twiggs finally swore that, in the summer of 1897, Captain Carter saw an 8-course mattress, sunk in the work at Cumberland Sound; that Carter inspected that mattress in detail and approved it; and that it was worse than the mattress Gillette built and inspected in August, 1897, after Carter had left Savannah. (Rec., 1168-69.)

The travel vouchers of Carter (which show whether Carter was at Cumberland Sound at that time) were seized by Gillette, and those which related to travel about that time are now missing. (Rec., 6549.) Copies of those missing vouchers, however, have since been obtained from Washington, and have been put in evidence. *They show that Carter was never at Cumberland Sound when an 8-course mattress was sunk; and that the story of Twiggs, in regard to Carter's inspection of such a mattress, is pure fiction.* (Rec., 8180; 6567-68.)

Defendant's Witnesses.

Among the twenty-nine engineers, who testify in favor of the defendant, are three who were called as witnesses by the Government, but whose testimony was almost entirely in favor of the defendant.

The names of the twenty-nine engineers who thus testify in favor of the defendant are as follows:

(1) Gen. W. P. Craighill (Rec., 901; Rec., 3415; Rec., 12170). This officer was Carter's Division Engineer, when the harbor work in issue was begun, and was Chief of Engineers, when that work was completed.

Gen. Craighill testifies that Carter's work at Savannah is "one of the most successful works of which I have any knowledge, either in this or in any country"; he testified that advertising for thirty days is not necessary; that military fascines were not required under the contracts; that multiple mattresses were permissible under the contracts, etc. Gen. Craighill also testifies that the contracts expressly provided that Carter, the engineer in charge, had the power to construe them; and Gen. Craighill sustains Carter's interpretation of those contracts, etc.

(2) Gen. William Ludlow (Rec., 3003). This officer was in charge of the improvement of New York harbor at the time he testified.

Gen. Ludlow testifies that a contract must give discretion to an

engineer, if successful work is desired; that military fascines were not required under the contracts; that multiple mattresses are permissible under the contracts, etc.

(3) Col. T. H. Handbury (Rec., 3503). This officer built the great jetty at the mouth of the Columbia River, and was a member of the Board of Engineers, which prepared the plans for the harbor work Carter started at Cumberland Sound in 1896. That Board estimated the cost of brush mattresses at $1 per square yard.

Col. Handbury testifies that the Chief of Engineers is responsible for the contracts and specifications; that it is proper under the projects and contracts to increase the brush work, if necessary; that it is proper to sink mattresses in multiple; that military fascines are not required, etc.

(4) Col. J. B. Quinn (Rec., 4503). This officer succeeded Gillette in charge of Savannah Harbor in 1903, and was also, at the time he testified, the Division Engineer over the Southeast Division for Rivers and Harbors in the United States.

Col. Quinn testifies that the work Carter did at Savannah was in most excellent condition in 1903; that it had needed only the most trifling repairs; that it had accomplished most excellent results, etc.

(5) Col. W. L. Marshall (Rec., 3165). This officer was in charge of the improvement of Chicago Harbor at the time he testified.

Col. Marshall testifies that it is perfectly proper to advertise for less than thirty days; that only one copy of the specifications need be sent out to applicants; that military fascines are not required under the contracts; that multiple mattresses are permitted thereunder, etc.

(6) Col. J. H. Willard (Rec., 3091). This officer was in charge of the Vicksburg district of the Mississippi River improvements at the time he testified.

Col. Willard testifies that it is perfectly proper to advertise for less than thirty days; that it is right to send only one copy of the specifications to applicants; that military fascines are not required by the contracts; that sinking mattresses in multiple is permissible thereunder; that the project was properly executed at Cumberland Sound, etc.

(7) Col. W. H. Bixby (Rec., 8461). This officer had formerly been in charge of harbor work on the coasts of North and South Carolina, and at the time he testified, in 1905, was in charge of Chicago Harbor, and was Division Engineer over the Northwest Division for Rivers and Harbors in the United States.

Col. Bixby testifies that the contractors used more material at Savannah and at Cumberland Sound than was required by their contracts; that it was perfectly proper to sink mattresses in multiple; that it saved the Government vast sums of money; that it was perfectly proper to buy mattresses by the square yard, etc.

(8) Col. W. T. Rossell (Rec., 2997). This officer was in charge of the improvement of Mobile Harbor at the time he testified.

Col. Rossell testifies that multiple mattresses were permissible under the contracts; that Carter did right not to specify them, when one contractor owned the patent for sinking them, as Gaynor did; that military fascines are not required, etc.

(9) Major F. A. Mahan (Rec., 3071). This officer was in charge of the improvement of Pensacola Harbor at the time he testified.

Major Mahan testifies that it is perfectly proper to advertise for less than thirty days; that he always sends out only one city of specifications, unless he knows the applicant will bid; that the tarred rope used to tie the fascines was suitable material; that military fascines are not permissible under the contracts; that the engineer has the right to vary the amount of brush; that it is right and proper to call for one price on three designs of mattresses, etc.

(10) Major C. McD. Townsend (Rec., 2937; Rec., 12232). This officer had formerly been in charge of harbor works on the Atlantic Coast, and at the time he testified was in charge of the Memphis District of the Mississippi River improvements.

Major Townsend testifies that he has used millions of yards of brush mattresses; that he used specifications almost identical with Carter; that under those specifications he accepted material almost identical with that accepted by Carter under the big contract at Savannah; that he sends only one copy of specifications to applicants; that the contracts at Savannah permitted sinking mattresses in multiple; that Carter was right in not specifying multiple mattresses, because Gaynor owned the patent for sinking them, etc.

(11) Major T. H. Rees (Rec., 778; Rec., 2833; Rec., 12303). This officer was Carter's assistant, when the method of brush mattress construction (which is now criticised) was first adopted at Savannah in 1893, and at the time he testified, was Assistant Professor of Engineering, at the United States Military Academy at West Point.

Major Rees testifies he was present when bids were received for the big contract in 1892; that he was Carter's assistant when mattresses were first sunk in multiple in 1893; that General Craighill was present when the matter was discussed, and that he approved of it; that multiple sinking is permissible; that military fascines should not be used; that Twiggs was not oppressed, etc.

(12) Major G. W. Goethals (Rec., 3412). This officer was in charge of one of the departments in the office of the Chief of Engineers at Washington at the time he testified.

Major Goethals testifies that Carter asked whether some money, which was received in 1896 or 1897 from a man named Hirt, for the use of a Government snag boat, which use had been authorized by the Chief of Engineers, could be placed to the official credit of an appropriation for work on the river where the boat was used, and he replied that it could not be, etc.

(13) MAJOR D. D. GAILLARD (Rec., 725). This officer (who was called by the complainant) had been an assistant on works of harbor improvement on the Atlantic Coast of Florida, and was employed on the Washington Aqueduct at the time he testified.

Major Gaillard testifies in Carter's favor that Carter's two designs of brush mattresses cost about the same; and that the log mattresses, which Carter did not use, would have been cheaper for the contractors, etc.

(14) CAPTAIN HARRY BURGESS (Rec., 767). This officer had been an assistant to Carter, and was Secretary of the Board of Engineers which prepared the plans for the harbor work, which Carter started at Cumberland Sound in 1896.

Captain Burgess testifies that the regulations issued by Carter for his office employés were most rigid, and that the greatest care was taken to secure exactness; that the orders were "that everything should be done in accordance with the regulations," etc.

(15) O. M. CARTER (Rec., 7989). This witness is a civil and military engineer of twenty-five years' experience. Carter built the harbor works at Savannah, and is the principal defendant in this case.

Carter testifies that the sinking of mattresses in multiple at Savannah saved more than a million dollars to the Government, and was a loss to the contractors; that it was much cheaper for the Government to buy mattresses by the square yard, as it did, than to buy them by the cubic yard, as the complainant now contends ought to have been done; that the specifications for the work were approved by the Chief of Engineers; that all work was done in accordance with the contract, etc.

Carter has also been listed as a witness on page 9.

(16) LYMAN E. COOLEY (Rec., 8528). This witness is a civil engineer of thirty-one years' experience, and a member of the American Society of Civil Engineers. Cooley had been Advisory Engineer on the Erie Canal, the Chicago Drainage Canal, a member of the International Deep Waterway Commission, etc.

Cooley testifies it was very much to the interest of the Government to sink mattresses in multiple, as Carter did, and that the contract permitted it; that military fascines were not required; that the materials required by the contract were actually used, etc.

(17) G. Y. WISNER (Rec., 2600; Rec., 12095). This witness is a civil engineer of thirty-five years' experience, and a Director of the American Society of Civil Engineers. Wisner had been in charge of the Eads jetties, was a member of the United States Deep Waterway Commission, etc.

Wisner testifies he examined Carter's works. He testifies that the specifications were suitably drawn, and that all work was done in accordance therewith; that all three mat designs cost the same; and that the prices were reasonable. Wisner testifies that some of the work done by Carter just before he left the Savannah District was in

an unfinished state, and that Gillette's actions, in leaving that partly completed work unprotected, cost the United States many hundred thousand dollars, and that Carter's action, in causing the contractors to sink mattresses in multiple, saved more than $1,000,000 to the Government, in Savannah Harbor alone, etc.

(18) C. P. E. BURGWYN (Rec., 12929). This witness is a civil engineer of twenty-eight years' experience, and a member of the American Society of Civil Engineers. Burgwyn had been in charge of the harbor works on the James River below Richmond, etc.

Burgwyn testifies he was a competitor of Greene and Gaynor in bidding on work at Savannah; that the specifications used by Carter were clear; that the bidding was fair; and that every information desired was given to prospective bidders by Captain Carter. He also testifies that the three designs of mattresses cost the same; that the specifications called for civil engineering fascines, and not for military fascines, etc.

(19) L. Y. SCHERMERHORN (Rec., 3443; Rec., 12422). This witness is a civil engineer of thirty-seven years' experience, and a member of the American Society of Civil Engineers, Schermerhorn had been in local charge of the improvement of the Delaware River, and was, at the time he testified, the President of the largest Dredging Company in America.

Schermerhorn testifies he was present when bids were received for the big contract in 1892; that every bidder was given full and free information; that the competition was open and untrammeled; that the specifications were clear; that the work was done in accordance with them; that the prices bid were reasonable, etc.

(20) A. E. KASTL (Rec., 2819). This witness is a civil engineer of twelve years' experience, and a member of the American Society of Civil Engineers. Kastl built the great jetties at Tampico, Mexico, etc.

Kastl testifies the tarred rope used to tie fascines was suitable for that purpose; that military fascines were not desirable, etc.

(21) R. A. BLANDFORD (Rec., 2993). This witness is a civil engineer of thirty-two years' experience, and at the time he testified was in charge of the Chatham Drainage Canal, Georgia.

Blandford testifies concerning tests of the strength of tarred rope, etc.; and concerning the prices paid for fascines, mattresses, etc. His testimony shows that the work done under Captain Carter was very economically done.

(22) J. W. RUTHERFORD (Rec., 736; Rec., 3155; Rec., 12872). This witness is a civil engineer of twenty-eight years' experience, who had been in charge of works on the Missouri River, where vast amounts of brush were used, and who, at the time he testified, was Receiver of the Pennsylvania Midland Railroad. Rutherford testifies he examined the work at Cumberland Sound (and the specifications therefor) with the view to bidding for the work in 1896. He testifies he had full and free information; that the specifications

were clear, and that the prices bid were reasonable. He further testifies the work had been done in accordance with the contract, etc.

Mr. Rutherford further testifies the witness Venable told him he did not intend to bid on the work in 1896, but went to Savannah simply to sell his stone.

(23) R. S. BURNETT (B. E. Ex. 123-G). This witness is a civil engineer who, for many years, had been employed on the improvements of the Savannah River, the Kentucky River, etc.

Burnett testifies he had had long experience in fascine and mattress work; that he had inspected the work done by Greene and Gaynor; that all of the fascine and mattress work in the Savannah District had been well done, etc.

(24) G. W. BROWN (Rec., 847; Rec., 3049). The witness is a civil engineer who had been employed on the Savannah River, the Tennessee River, etc., and who at the time he testified was an Engineer for the Nicaragua Canal Commission.

Brown testifies the work he saw in the Savannah District was done according to the specifications. He testifies the work done at Cumberland Sound in 1896 was inspected by him; that the fascines were well made; that the work was in good condition. He also testifies that *Cooper admitted to him that, under the big contract, the contractors were being held closely up to the contract, etc.*

(25) R. F. ENSEY (Rec., 519; Rec., 3352). This witness is a civil engineer, who was in local charge under Carter of the improvement at Savannah Harbor, at the time the brush mattress construction (which is now criticised) was first adopted under the big contract.

Ensey testifies he inspected the mattress work done in Savannah Harbor in 1893; that he began the work of constructing multiple mattresses in Savannah Harbor; that all of those mattresses were built in strict accordance with the specifications to the contracts, etc.

(26) CAMPBELL FORD (Rec., 3140; Rec., 12945). This witness is a civil engineer who was an assistant to Carter during the execution of the work in Savannah Harbor which is now in issue.

Ford testifies he was employed as an Inspector both at Augusta during the Twiggs contract, and at Savannah during the Greene and Gaynor contract, known as the big contract; that all work was done in accordance with the specifications to the contract; that A. J. Twiggs was treated just as well as Greene and Gaynor, etc.

(27) J. H. WESTERFIELD (Rec., 3458). This witness is a civil engineer who was employed by General Gillmore on the Savannah Harbor work, when brush construction was first adopted in that locality. This was before Carter ever reached Savannah. Westerfield was also employed on that same work under Carter at a later date, and at the time he testified, he was on the Kentucky River improvement.

Westerfield testifies the fascines made under Captain Carter were identical with those made under General Gillmore, etc.

(28) E. A. GIESELER (Rec., 1322; Rec., 486). This witness (who was called by the complainant) is a civil engineer who was the assistant in local charge of the Savannah office. After Gieseler had testified in favor of Carter, he was dropped from the Government pay rolls by Gillette.

Gieseler testifies to fascines, which Captain Gillette thought ought to have been used, are not as valuable as those which Captain Carter used, etc.

(29) E. R. CONANT (Rec., 1575; Rec., 493). This witness (who was also called by the complainant) is a civil engineer, who was in local charge of the work done by the contractor, A. J. Twiggs, and who, later, was in local charge of the work done at Cumberland Sound.

Conant testifies the method of fascine choking was the same under Twiggs at Augusta as under Gaynor at Cumberland Sound, but that the brush was entirely different, one being the straight brush of the up-country, and the other the scragly brush of the coast.

Conant testifies that at Cumberland Sound the fascine mattress work stood up a foot to the mattress course, after it had been loaded with stone. He testifies he was furnished with the specifications, and was required to make the contractor comply with them, etc.

Conant also testifies that the statements of A. J. Twiggs, as to the work done by him at Augusta, and as to his alleged oppression, are false.

CONTRACTORS AND EMPLOYÉS.

Nineteen contractors, and seventeen of their employés, testified in this case. Of these, three contractors (and eight of their employés) testify in favor of the complainant, while sixteen contractors (and nine of their employés) testify in favor of the defendant. One of the contractors who testified in favor of the defense was summoned by the Government, but as his testimony favors the defendant, he will be listed among the witnesses for the defense.

COMPLAINANT'S WITNESSES.

Of the eight employés of contractors who testify for the complainant, only one is a witness of importance. Of the other seven witnesses, one witness (J. G. SMITH, Rec., 1913) was a discharged employé of Greene and Gaynor; two witnesses (JAMES FOLEY Rec., 1549, and F. A. D. HANCOCK, Rec., 1531; 489) were employés of the disgruntled contractor W. H. Venable; and four witnesses (J. W. BOHLER, Rec., 1719; MADISON COBB, Rec., 1696; S. M. HILL, Rec., 1706; and AMORY SIBLEY, Rec., 1710) were employés of the disgruntled contractor A. J. Twiggs, two of these latter men (Bohler and Hill) being also discharged employés of Carter.

The names of the three contractors (and of the one contractor's

employé of importance), who testify for the complainant, are as follows:

(1) C. P. Goodyear (Rec., 10534). This witness is a contractor, who testifies he had a grudge against Carter, and to whom after Goodyear had testified against Carter, Gillette gave a government contract for dredging, at a price 60 per cent. greater than Gillette had sworn that work was worth.

Goodyear testified that, in 1892, Carter sought a *private interview* with him, and made him a proposition to enter into a conspiracy to defraud the government; that he knew Carter only "casually," but that after considering that proposition for some time, he finally declined it. The letters of Goodyear (which are in evidence) show that his entire story is false.

The credibility of this witness Goodyear is attacked in References to the Evidence, p. 573.

(2) A. J. Twiggs (Rec., 1646; Rec., 11098). This witness is a contractor, who testifies he has a grudge against Carter and against Gaynor, and to whom, after Twiggs had testified against Carter, Gillette gave a large government contract, without any compensation whatever.

Twiggs testified that, in 1893, Carter oppressed him in various ways, which he describes. The Government inspectors, Conant and Ford, who were in charge of the work done by Twiggs, as well as Major Rees, United States Engineers, testify that the statements of Twiggs are false.

The credibility of this witness Twiggs is attacked in References to the Evidence, p. 515.

(3) W. H. Venable (Rec., 1537; Rec., 10559). This witness is a contractor, who testifies he has a grudge against Greene and Gaynor, and to whom, when Venable testified against Carter, Gillette gave extensions of his government contract.

Venable testifies he did not come to Savannah to bid on any work, but to sell his stone, which he did. When he had a quarrel with Greene and Gaynor about his stone, and they did not take it, he then swore that although he "know absolutely nothing" about mattresses, still if he could have bid different prices for mattress designs, he "would have had no hesitancy in bidding," etc.

The credibility of this witness Venable is attacked below:

Venable is a disgruntled sub-contractor under Greene and Gaynor, and swore concerning his presence at Savannah, when bids for the harbor work were called for in 1896, etc.:

> "I came here primarily to sell my stone, being in the granite business." (Rec., 1540.) "I wanted to see Mr. John F. Gaynor about selling him stone. If I could sell it to him, I preferred not to bid." (Rec., 10567.) "I negotiated with Mr. John F. Gaynor and Mr. Greene." (Rec., 10568.) "I told them I did not want to bid, but I wanted to sell the stone." (Rec., 10569.) "We came to terms, my remembrance is,

the night before the letting." (Rec., 10568.) "I drew up a contract, which the next morning was signed by John F. Gaynor." (Rec., 10568.)

"Q. (By Mr. Erwin.) Then you did not put in your bid?

A. No, I did not." (Rec., 10569.)

Before the Board of Engineers, in September, 1897, Venable did not pretend he could not bid on the work, on account of alleged obscurity in the specifications, but said, through his agent, who was F. A. D. HANCOCK:

"A. Our preparations for bidding began very close to the time bids should be put in, and we did not feel that we were in a position to put it in with such little preparation as we had to get up figures. If we had had a few days longer we might have done it. My recollection is that the people associated with us only came here 3 or 4 days before the letting of the work, and they were unfamiliar with that kind of work. The reason we entered into the business at all was because they knew that I had a lot of experience down on the seaboard and was familiar with the local conditions. We did not have time to go into the matter fully,—we did not have time to get ready, and we felt that it was not a good business proposition for us to bid.

Q. Who were the people you represented?

A. Venable Bros., who are now constructing the work at Tybee." (Rec., 493.)

When it was pointed out that Hancock had known for more than three weeks just when the work was to be let, and if they needed only a "few days longer" to get ready, it was their own fault they did not have that time, Venable then changed his contention, and alleged that the specifications were obscure, testifying:

"Q. Suppose the specifications had required a separate price to be stated for each style of mattress?

A. I would have had no hesitancy in bidding." (Rec., 1549.)

Yet Venable was forced to admit on the witness stand:

"I knew absolutely nothing about the manufacture or use of the mattresses, never having had any experience in that line of business." (Rec., 1538.)

"I did not thoroughly understand the manner of the construction of the mats, and I could not get any information, not from him (Carter); *I didn't ask him, except in a general way."* (Rec., 1540.) *"I was not with him exceeding 20 minutes, I guess."* (Rec., 1545.)

Yet this man Venable, who admits he knew absolutely nothing about the work (Rec., 1538), swears he prepared a bid (Rec., 10568), but that, after making a contract with Greene & Gaynor to take his stone, he did not bid (Rec., 10569), and that later Greene and Gaynor refused to take his stone. Venable testifies:

> "Q. After the contract had been let to the Atlantic Contracting Company, did you furnish any stone under your subcontract with Greene and the Gaynors?
>
> A. I furnished very little of it." (Rec., 10584.)
>
> "The Witness: I spent a good large sum of money getting my lifts and everything ready to supply the 350,000 tons that I had contracted to furnish, of one, two and three." (Rec., 10587.)

Being angry with Greene and Gaynor, because they failed to take his stone, Venable then swore he was unable to bid because Captain Carter's specifications would not let him bid different prices for the three mattress designs! (Rec., 1548.)

That Venable was aided by Gillette in his contract for fortification work at Tybee Island, Georgia, where he was very much behind with his work, is shown by Venable's own testimony:

> "A. * * * It was in July of '98, I think, that the Venable Construction Company finished at Tybee Island.
>
> Q. *And you had some extensions of your contract, didn't you?*
>
> A. *Yes, sir.*" (Rec., 10611.)

On September 24, 1897, Venable wrote to Captain Carter:

> "I see by telegrams to the Atlantic Constitution that it has been intimated in Savannah that some stone contractor instigated the investigation of your management. The articles seem to refer to Venable Brothers, and I therefore hasten to assure you on my return from New York that any such impression is utterly false." (Rec., 8248.)

Venable was not accused, yet he hastened to explain!

(4) J. L. GALLEGHER (Rec., 2238; Rec., 10993).

This witness is a discharged employé of Greene and Gaynor, whom Gillette sought out and put on the Government pay rolls, and used to testify against Carter.

Gallegher testifies he kept some of the books at Savannah for Greene and Gaynor, and that so far as he knew, it did not cost them much to do their work there.

The credibility of this witness Gallegher is attacked below.

Gallegher testifies he is a discharged employé of Greene and Gaynor, saying, " I was discharged." (Rec., 2243.)

Gallegher further testified he was "suing" Greene and Gaynor,

and that his idea was to bring a new suit against them "every month" and in that manner *"to make it lively for them."* (Rec., 2246-47.)

When Gillette found out that Gallegher had been discharged by Greene and Gaynor, and was seeking vengeance against them, Gillette at once employed Gallegher (on the Government pay rolls) to testify against Carter, for Gallegher admitted on the witness stand that "about four or five months" after he had been discharged, Gillette "sent for me" (Rec., 2244), and Gallegher testified that Gillette then employed him and put him on the Government pay rolls. (Rec., 11013.)

Gallegher then testified for Gillette that Greene and Gaynor had done their work in the Savannah District very cheaply, saying he had been their bookkeeper, and thought their disbursements were small, etc. (Rec., 11019.)

Defendant's Witnesses.

The names of the sixteen contractors (and their nine employés) who testify in favor of the defendant are as follows:

The following two witnesses are the contractors with whom the complainant charges Captain Carter was in collusion, and they testify as follows:

(1) E. H. Gaynor (Rec., 1001). This witness testifies that all work he did in the Savannah District was in accordance with the contract, etc.

(2) W. T. Gaynor (Rec., 998). This witness testifies that all work he did in the Savannah District was in accordance with the contract, etc.

The contractors B. D. Greene and John F. Gaynor have been listed under the witnesses on the money matters, and need not be listed again here.

The following fourteen witnesses are contractors, who were competitors of Greene and Gaynor, and they testify as follows:

(3) J. A. Bryan (Rec., 1034). This witness is a contractor who did the harbor work on the St. Johns River, Florida, etc. He was a competitor of Greene and Gaynor.

Bryan testifies he examined the specifications for the work in the Savannah District, and that they are clear. He testifies that work at Cumberland Sound costs more than at Mayport. He also testifies he examined the fascines built at Cumberland Sound, under the contracts of 1894 and 1896, and that they are as well built as any he had ever seen, etc.

(4) C. C. Ely (Rec., 659; Rec., 3545). This witness is a contractor who was engaged in work on the South Atlantic Coast. He was a competitor of Greene and Gaynor.

Ely testifies that Captain Gillette tried to induce him to testify against Carter, and concerning matters of which he had no knowledge; and that Gillette threatened to besmirch him if he would not do so. (Rec., 665-67.)

Ely also testifies the three mattress designs of Carter's specifications cost the same per square yard, and that the dredging, which the witness A. S. Cooper swore (in his opinion) cost only 6 cents per cubic yard, cost in reality 16.38 cents per cubic yard, etc.

(5) E. L. FRIDAY (Rec., 996). This witness is a son of the contractor who built the jetties at the entrance to the harbor of Charleston, S. C. Friday was a competitor of Greene and Gaynor. Friday testifies he was a competitive bidder against Greene and Gaynor; that he did not dare to bid any lower in 1896; that the bids were reasonable; that he knew multiple mattresses could be used, etc.

(6) JACOB FRIDAY (Rec., 996). This witness is the contractor who built the jetties at Charleston, S. C. He was a competitor of Greene and Gaynor.

Friday testifies there is no advantage to a contractor in sinking mattresses in multiple; that he got all information for bidding from Captain Carter; that everything was perfectly fair; that it cost about 80c. to 90c. a square yard for mattresses in the Savannah District, etc.

(7) J. L. GRIM (Rec., 13073). This witness is a contractor of Philadelphia.

Grim testifies he was a competitor of Greene and Gaynor; that all contractors were treated fairly; that they got all the information they desired; that the bidding was fair; that the prices bid were reasonable, etc.

(8) I. H. HATHAWAY (Rec., 1008). This witness is a contractor of Washington, D. C. He was a competitor of Greene and Gaynor.

Hathaway testifies he built fascine mats at Mayport, Florida; and that the fascine mattresses at Cumberland Sound were practically the same.

He also testifies that work at Cumberland Sound costs 30% more than the same work at Mayport, and that the prices at Cumberland Sound in 1896 were reasonable, etc.

(9) RITTENHOUSE MOORE (Rec., 1015). This witness is a contractor of Mobile, Alabama. He was a competitor of Greene and Gaynor.

Moore testifies he is familiar with the works at Savannah and at Cumberland Sound, and knows the cost of brush mattresses, etc., and that the actual cost of such work is from 60c. to 78c. per square yard, etc.

(10) RODERICK G. ROSS (Rec., 1019; 8793). This witness is a contractor of Jacksonville, Florida, who built the first brush-fascine mattress ever used on the Atlantic Coast. He was a competitor of Greene and Gaynor.

Ross testifies he is familiar with the work done at Cumberland Sound, and with the specifications therefor: that the fascines and mattresses there were substantially the same as those built by him at Mayport, Florida; that it cost from 10% to 20% more to do work at Cumberland Sound than at Mayport; that the prices for the

work at Cumberland Sound were reasonable; that he received from Captain Carter full and free information concerning the work to be done, etc.

(11) P. SANFORD ROSS (Rec., 844-47; 3757-68; 12915-28). This witness is a contractor of Jersey City, N. J., and Savannah, Ga. He was a competitor of Greene and Gaynor.

Ross testifies the bidding was fair; that all the contractors understood just what was to be done; that the prices bid were reasonable, etc.

(12) J. B. SANFORD (Rec., 1020). This witness is a contractor of Baltimore, Md. He was a competitor of Greene and Gaynor.

Sanford testifies he is familiar with the harbor work of the South Atlantic Coast; and knows the prices of work in the Savannah District to be reasonable, etc.

(13) S. W. SKINNER (Rec., 1021). This witness is a contractor of Wilmington, N. C. He was a competitor of Greene and Gaynor.

Skinner testifies he is familiar with mattress construction on the Atlantic Coast; and knows the prices in the Savannah District were reasonable, etc.

(14) A. R. STEWART (Rec., 650-8). This witness is a contractor of Columbia, S. C. He was a competitor of Greene and Gaynor.

Stewart testifies he carefully examined the specifications of Captain Carter and found them clear; that he was given all information he desired, and knew just how the mattresses were to be built; that there was no difference in the cost of the three designs of matresses; that he never heard a word from any bidder as to any unfair treatment, etc.

(15) T. E. WALLACE (Rec., 1022). This witness is a contractor of Wilmington, N. C. He was a competitor of Greene and Gaynor.

Wallace testifies he is familiar with fascine-mattress construction; that the prices in the Savannah District were reasonable, etc.

(16) JACOB PAULSEN (Rec., 2018). This witness (who was called by the complainant) is a contractor of Savannah, Ga. He was a competitor of Greene and Gaynor.

Paulsen testifies that he was bondsman for, and put in the bid of, W. F. McCauley, for the big contract in 1892, etc.

The following six witnesses were foremen who had charge of the construction of the brush fascines and mattresses used in the Savannah District:

(17) E. BRANSFIELD (Rec., 983). This witness testifies he was a foreman employed by Greene and Gaynor to construct fascines and mattresses; that the mattresses were built in accordance with the contracts; and he gives details concerning their construction, etc.

(18) C. C. COLE (Rec., 3487-96; 4502-3; 13079-88). This witness testifies he was a foreman employed by Greene and Gaynor on fascine and mattress construction. He testifies the work was all done according to the specifications to the contract, etc.

(19) W. N. CONNELL (Rec., 3478-83; 13021-36; 13072). This witness testifies he was a timekeeper and agent in charge of work for the Atlantic Contracting Company. He testifies in detail con-

cerning the construction of fascines and mattresses, and he swears they were all built in accordance with the specifications to the contracts, etc.

(20) T. F. GAYNOR (Rec., 12981-13016). This witness testifies he was a foreman in the brush camps of the Savannah District. He testifies all work was well done, in accordance with the specifications to the contracts, etc.

(21) W. J. HARRIS (Rec., 3484-87). This witness testifies he was formerly a timekeeper and foreman for Greene and Gaynor. He testifies all of the fascines used were tightly choked with rope or chain chokers, and were made into mattresses in exact accordance with the requirements of the contracts; that there were no holes or voids in the mats, etc.

(22) J. E. NICHOLAS (Rec., 1016). This witness testifies he was a foreman for Greene and Gaynor, and had charge of fascine and mattress work. He testifies all work was done in exact accordance with the specifications, and that the mat work cost about 80c per square yard. He describes in detail the mattress construction, etc.

The following two witnesses are foremen who had charge of the sinking of the brush fascines and mattresses used in the harbor waters of the Savannah District:

(23) J. H. GAYNOR (Rec., 13089-13101). This witness testifies he was a foreman in charge of the mattress and stone work done in Savannah Harbor. He testifies all work was done in exact accordance with the specifications to the contracts, etc.

(24) M. J. WHEELER (Rec., 1023). This witness testifies he was a foreman for Greene and Gaynor, and had had sixteen years' experience in harbor work. He testifies all work was done in accordance with the specifications; that the mattresses at Cumberland Sound were practically the same as those built at Mayport, Florida; that Marion Twiggs told him the fascines and mats were up to the contract requirements, etc.

The following witness had charge of the towing of most of the brush fascines and mattresses used in the harbor works of the Savannah District:

(25) CHARLES SWEENEY (Rec., 4498-4501; 13055-71). This witness is a Master of Steam Vessels, who towed most of the brush fascines and mattresses used by Greene and Gaynor in the harbor work at Savannah.

Sweeney testifies he towed nearly all of the fascines and mattresses which were used in the Savannah Harbor work; he testifies all of the work was well done; that he has heard Captain Carter order Cooper (and other assistants) to hold the contractors closely up to the specifications; and has heard those men reply that those instructions were carried out, etc.

Miscellaneous.

Seventy-six miscellaneous witnesses testify in relation to matters connected with the engineering work. Of these, thirty-three testify on behalf of the complainant, and the remaining forty-three testify on behalf of the defendant.

Complainant's Witnesses.

Of the thirty-three witnesses, who testify on behalf of the complainant in relation to the work, one witness (H. L. Marindin, Rec., 4200-16) was a surveyor, who said he made a survey of Tybee Roads in 1898; one witness (J. H. Grundel, Rec., 1370) was a draftsman, employed by Gillette to make such drawings as Gillette ordered, and who did so; one witness (F. R. Howard, Rec., 1772), was a clerk, employed by Gillette to do typewriting, and who said he thought an undescribed paper had been written on the machine he was using; two witnesses (J. M. Hall, Rec., 1772-3; and R. B. Woolvin, Rec., 502-4; 1731-4) were inspectors, employed by Gillette, who testified to little of importance—one of them saying he took some brush and choked it for Gillette, until he broke the chain chokers and cut the ends of the brush off, and the other that he inspected some work, said to have been done at Augusta in 1893, and that it appeared to be well done, etc.; three witnesses were clerks employed in the War Department at Washington—two of whom (J. C. Baxter, Rec., 1769-71, and J. B. McCarthy, Rec., 1081-6) simply produced or identified papers, while the other (J. Tweedale, Rec., 1858) said he thought Captain Carter ought not to have published advertisements as the written orders of the Secretary of War (contained in the approved plans and specifications) required him to do, but that he ought to have changed the dates of those advertisements, as the complainant now says he ought; one witness (J. K. Garnett, Rec., 2061) was a merchant who testified about the brush on Hunting Island, saying that Gaynor bought some of it; one witness (C. S. Hardee, Rec., 2097) testified about the sale of ballast rock by the City of Savannah to Greene and Gaynor; one witness (W. H. Patterson, Rec., 1725-28) was a dealer in stone, who said he came to Savannah in 1896 to sell his stone; one witness (W. W. Osborne, Rec., 1017) was a lawyer, who said he asked for specifications for a client; one witness (W. F. McCauley, Rec., 1013, 1922-3, 3542-3) was a banker, who said he went on two bidders' bonds, etc.: McCauley also testified as a witness for the defendant; one witness (T. J. Agnew, Rec., 1487-93, 10617-41) was an agent, who said he submitted a bid for his principal in 1894; one witness (M. C. L. Guilford, Rec., 4197-99) was a boy, who said he found some old fascine chokers in the woods of South Carolina; one witness (O. C. Darling, Rec., 4448-50) was a man who said he sold brush to Greene and Gaynor; two witnesses (F. Du

BOSE, Rec., 4445; and P. HOPPER, Rec., 4432-37) were men who said they once worked for Greene and Gaynor at making fascines and mattresses; ten witnesses were negro laborers, who said they once worked for Greene and Gaynor; some of these men swore they were defrauded of their wages, but when asked whether they got small pay because they did poor work, they all testified the work they did was of the best; that they used plenty of good brush for the fascines and choked them very tightly; but that Greene and Gaynor only paid them about $1 a week, and cheated them in every way. Other of those ten negroes simply testified about some old fascine chokers they said they found in the woods.

Those ten witnesses, who are negro laborers, all of whom said that they had once worked for Greene and Gaynor, but had been discharged, are as follows:

ALLSTON, MARTIN (Rec., 1939).
ALLSTON, RICHARD (Rec., 4199-4200).
BURKE, EDWARD (Rec., 1808-13).
HABERSHAM, RUFUS (Rec., 1814-17).
JENKINS, JOSEPH (Rec., 2582-04).
KINLAW, HECTOR (Rec., 1934-37).
MILLER, A. M. (Rec., 1937-39).
SAWYER, ROYAL (Rec., 1795-1802).
SMALL, ANSON (Rec., 1933-34).
WINTER, ELISHA (Rec., 1802-08).

The negro Richard Allston simply identified some chokers which he said he used when he worked for Greene and Gaynor. (Rec., 4199.)

The nine remaining negroes testify that Greene and Gaynor paid them starvation wages, sometimes only one dollar a week (Rec., 1933), and that Greene and Gaynor refused to pay them for the work they had honestly done (Rec., 1805); but they also testify that they did splendid work, that they used plenty of good brush, that the fascines were very tightly choked, were 12 inches in diameter, and were in every respect good work. (Rec., 1797, 1805, 1809, 1813, 1816.)

The remaining five witnesses are the only important witnesses for the complainant on matters relating to the work.

The names of these five important witnesses for the complainant are as follows:

(1) S. M. HALE (Rec., 504, 1301). The witness Hale was employed occasionally by Captain Carter to do odd jobs. After Carter left Savannah, Hale was put on the government pay rolls by Gillette, and was used as a witness to estimate the cost of fascines and fascine mattresses (Rec., 1304), although Hale admitted on the witness stand that prior to being employed by Gillette, he had never even seen a fascine (or a fascine mattress) constructed. (Rec., 1313.)

Hale testified for Gillette that he found 100,000 square yards of brush fascines on Hilton Head Island, which he said had been washed out of the work done under Carter on the Tybee break-

water (Rec., 2491); but on cross-examination he admitted that at the very time he said he saw this, he was at a point which the chart shows was 7 miles away. (Rec., 2508.)

Hale said he found 80,000 square yards of brush fascines in one spot on Hilton Island, which he said was 800 feet long, 50 feet wide, and 2 feet deep. (Rec., 2512-13.) Hale admitted on cross-examination that he did not know the difference between a square yard and a cubic yard (Rec., 2511), and he explained his method of computing the 80,000 square yards as follows:

> "I multiplied 800 by 50, and then by 2; and then after that, I divided it by 3; and multiplied the answer of that by 2.
>
> "Q. Why did you divide by 3?
>
> "A. I tell you the truth; I am puzzled on it now. I can prove that, I can work it, I have got it worked out. It is simple, it is true; I make that 80,000 square yards." (Rec., 2515.)

Major C. McD. Townsend and Major Thomas H. Rees, Corps of Engineers, and Mr. George Y. Wisner, Director of the American Society of Civil Engineers, all went with Hale to inspect and measure the brush Hale said he saw; and they all testify that Hale made a false statement to the court; that there was less than 50 cubic yards of brush where Hale pointed out to them his alleged 80,000 square yards; and that there was not more than 70 cubic yards of brush on the entire island, where Hale swore there was 100,000 square yards. (Rec., 1628, 2833-4, 2937, 8166-69.)

This ignorant, lying witness was offered by Gillette as an "expert" on the cost of mattress work, and on other engineering questions.

(2) P. J. Keating (Rec., 1356, 534). This witness had been employed by Carter as a laborer, and for a few weeks as an inspector. After Carter had left Savannah, Keating was employed and put on the Government pay rolls by Gillette, and was used by him to testify against Carter. Keating made an estimate of the cost of mattress work, but he admitted he did not even know the meaning of the words he used in his estimate, which he said was written out by the engineer, E. A. Gieseler.

The credibility of this witness Keating is attacked below:

Keating had been employed by Captain Carter, in 1893, as a boatman (Rec., 1363), and for six weeks, in 1894, as an inspector at the mattress camp. (Rec., 1363.)

At the time he testified, Keating was employed by Gillette, on the Government pay rolls. (Rec., 1356.)

Keating testified for Gillette that (in his opinion) the brush fascine mattresses used by Greene and Gaynor, under Carter, cost them only 10.1 cents a square yard (Rec., 1360); but Keating admitted, on cross-examination, that he knew nothing of his own

knowledge of the cost of such work. (Rec., 1365.) In his estimate of cost, Keating made an allowance for "amortization," which word he said, in cross-examination, he never heard of before he made his "estimate." (Rec., 1367.) Keating also admitted, on cross-examination, that his "estimate" was really made by an engineer, named E. A. Gieber, to whom he said Gillette told him to go, in order to get aid in "shaping the estimate." (Rec., 1367.)

Keating also testified for Gillette that he found a hole in one of the mattresses he had inspected for Carter (Rec., 1361); but Keating admitted, on cross-examination, that he never reported such a mattress to Captain Carter. Rec., 1365.)

Keating admitted further that Carter had ordered him never to show any favors to Greene and Gaynor (Rec., 1364); that Carter had once reprimanded him for not having required Greene and Gaynor to do good enough work, and had made them do that work over again, etc. (Rec., 1361.)

(3) J. W. O. STERLY (Rec., 1381, 593, 10592). This witness, who was employed and put on the Government pay rolls by Gillette, and who was used by him to testify against Carter, is a self-confessed murderer, forger, perjurer and thief.

Sterly produces papers from the Savannah office and testifies about them, etc.

The credibility of this witness Sterly is attacked below:

(*a*) The record in this case shows that Sterly confessed to Major C. McD. Townsend, of the United States Engineers, that he was a deserter from the German Army; and that he was a murderer and a fugitive from justice. (Rec., 2951.) Carter did not know this until after he left Savannah.

(*b*) When Captain Carter was in Europe in July, 1895, and Captain Goethals was temporarily in charge of Carter's district, Sterly made out a bill against the United States, which he collected from Captain Goethals, for travel by rail from Savannah to Washington and return, giving in detail the cost of the railway ticket, the Pullman fare, the dining car expenses, etc. Sterly made oath to the correctness of that bill, and collected the money on it, without Carter's knowledge. (Rec., 2276-80.)

On the witness stand, Sterly was forced to admit, on cross-examination, that the entire bill was fictitious; that he had committed perjury in swearing to it; that he had never made the railway journey, nor the disbursements, he swore he did; but that, instead, he had gone to New York and returned therefrom by sea, and had traveled on a free pass. (Rec., 2275, 2277-81.)

After thus testifying, Sterly was repeatedly called to the witness stand as a Government witness!

(*c*) Sterly, as Captain Carter's clerk, testified to the correctness of a certain pay roll, in 1892, and Carter supposed Sterly's certificate was correct. (Rec., 599.) In 1897, when questioned before the Board of Engineers, Sterly admitted that four names on that pay

roll were fictitious, and that they had all been written by him, but in a disguised handwriting, so as to make it appear they had been written by different people. (Rec., 603-04.) Carter testifies he knew nothing about it.

(*d*) Sterly was intrusted by Captain Carter, about January, 1897, with $118.20 which Carter collected from a man named Hirt, in connection with Hirt's use of a Government snag boat, which money the Chief of Engineers refused to accept from Carter, on the ground that the money belonged to Hirt, and not to the United States. Carter forgot about this money, when he left Savannah in July, 1897, and the money remained in Sterly's hand. (Rec., 2273.) Sterly confessed later to W. G. Austin,—(who had received from Congress a medal of honor for distinguished gallantry under fire)—that he (Sterly) had taken that money for his own use, *i. e.*, that he had stolen it; and he asked Austin to help him out, by stating that he (Austin) had disbursed the money for various expenses. Austin refused to do so, and then Sterly made out a bill of fictitious disbursements, which he submitted to Gillette with his story. (Rec., 3249.) Austin then told Gillette that Sterly's list of alleged disbursements was fictitious. (Rec., 3252-54.)

When Gillette and Sterly found out that Austin would testify (as he did) that Sterly's list of alleged disbursements was fictitious, Sterly then went on the witness stand, and swore he had disbursed the Hirt money for Captain Carter, but that he could not recall the details, because he had destroyed his vouchers. (Rec., 2475.)

(4) P. E. Twiggs (Rec., 481-6, 1284-1361, 1352-6). This witness, who was employed and put on the Government pay rolls by Gillette, and who was used by him to testify against Carter, is a self-confessed perjurer.

Twiggs testifies he thought Captain Carter ought to have used military fascines, etc.

The credibility of this witness Twiggs is attacked below:

P. E. Twiggs (who is a cousin of A. J. and Marion Twiggs) was an inspector for Captain Carter under the big contract. After Carter left Savannah, Gillette hired Twiggs (on the Government pay roll) (Rec., 1282), and used him as a witness against Carter.

Twiggs swore positively he had never been ordered by Captain Carter to see that the work should be done in accordance with the specifications, or that his first duty was to look after the interests of the United States, saying specifically, "*I will swear to that absolutely.*" (Rec., 1293-94.)

When Twiggs found out he had been caught, and that the orders of Captain Carter to him were in writing (Rec., 8358), he then came back to the witness stand, and admitted his former testimony was false, and Twiggs then swore positively and diametrically the opposite of what he had sworn before, saying that *Captain Carter had repeatedly given him orders "that the interests of the United States*

Government must be looked after and the specifications carried out." (Rec., 1353.)

(5) E. B. PARKER (II Hew., 88).

This witness is a laborer who was once employed by Greene and Gaynor.

The credibility of this witness Parker is attacked below:

Parker testified for Gillette, in 1903, that he was employed by Greene and Gaynor, in 1897, at Cumberland Sound; that he worked on the lighters (or barges) where those contractors were building brush fascine mattresses; that those mattresses were so loose and so open, that in going to and from the barges on which those mattresses were being built, he did not walk on the gang plank, which led to the shore, but crawled up and down right through those mattresses. (Rec., 4438-44.)

This same witness, E. B. Parker, swore, in 1897 (when his memory was fresh) that *he was never employed where any mattresses were built at all;* but that his only employment under Greene and Gaynor was around *"a mule lot"* and on *"one empty lighter."* (Rec., 8794-6.)

DEFENDANT'S WITNESSES.

Of the forty-three witnesses, who testify on behalf of the defendant in relation to the work, two witnesses (F. N. D. CLOSE, Rec., 2451, and RENE BAYON, Rec., 2471-2) were steamship clerks in New York, who testified as to the date of B. D. Greene's trip to and from Europe; one witness (D. F. PHELPS, Rec., 2472-4), was the chief law officer of the New York Custom House, who testified as to the date of Greene's arrival from Europe; one witness (J. D. CRONIN, Rec., 2440-45), was manager of an apartment house in New York, who testified as to the date of Greene's arival from Europe; two witnesses (M. HINMAN, Rec., 2448; and S. R. WEIL, Rec., 2445), were merchants of New York, who testified as to the date of Greene's arrival from Europe; two witnesses (C. A. L. CUNNINGHAM, Rec., 3237; and T. F. GLEASON, Rec., 3208), were merchants of Savannah, who testified about the horses Carter owned; one witness (S. F. B. GILLESPIE, Rec., 3377), was Deputy Clerk of the United States Court at Savannah, who testified as to the oath made by bidders' bondsmen; three witnesses (W. GARRARD, Rec., 3332; E. C. GLEASON, Rec., 3335; and W. J. WATSON, Rec., 3390), were aldermen of Savannah, who testified about the sale of stone owned by the city; one witness (J. J. MCDONOUGH, Rec., 3326-32), was a member of the Georgia Legislature, and formerly the mayor of Savannah, who testified about the sale of stone owned by the city; McDonough also testified on behalf of the Government in relation to the price of pine logs; one witness (HERMAN MYERS, Rec., 3200-2), was the mayor of Savannah, who testified about the sale of stone owned by the city; one witness (J. H. H. OSBORNE, Rec., 1017), was a tax assessor of Savannah, who

testified that Foley and Hancock, the ex-barkeeper and the employé of Venable, paid no taxes; one witness (J. D. PAIGE, Rec., 3202-7), was a physician of Savannah, who testified about a horse owned by Carter; three witnesses (P. K. DEMOND, Rec., 3526; W. J. HARRIS, Rec., 3484; and F. B. PAPY, Rec., 3526) were railroad officers of Savannah, who testified about stone shipped over their roads; one witness (E. D. LUCKENBILL, Rec., 3338-46; 12494-12504) was a railroad officer of Fernandina, who sold brush to Greene and Gaynor, and who testified their work was well done; one witness (T. A. HALL, Rec., 1009; 3341-9) was County Judge at Fernandina, who testified as to conversations he had with the Government inspector at Cumberland Sound; three witnesses (J. B. CONNOLLY, Rec., 3561, 4220; T. G. CONNOLLY, Rec., 994, and P. F. HARRINGTON, Rec., 1011) were former clerks or other employés under Carter, who testified Captain Carter ordered everything in his office to be done in accordance with the regulations, saying that if this was not done, it was carefully kept from Captain Carter; one witness (GEORGE GAMMONT, Rec., 1011) had been master of the United States Inspection Yacht "Angler," and testified to hearing Carter order his assistants to hold the contractors up to the contract, etc.; one witness (R. F. JONES, Rec., 3543) was the Steward of the United States Inspection Yacht, who testified he had often heard Captain Carter give Cooper, and other inspectors, orders to hold the contractors up to the specifications, etc.

The remaining seventeen are the important witnesses for the defense on matters relating to the work.

The names of those seventeen important witnesses for the defendant are as follows:

(1) W. BAYARD CUTTING (Rec., 8797-8). This witness is a capitalist of New York, who was one of the principal owners of the Florida Central and Peninsular Railway, whose Atlantic terminus was at Fernandina, Florida.

Mr. Cutting testifies he had great confidence in Captain Carter, and that in February, 1897, he made an arrangement with Hon. Daniel S. Lamont, the Secretary of War, for Carter to stay at Savannah until the Cumberland Sound work was completed; that the arrangement was such that Carter need not have left Savannah when he did in 1897, had he not wanted to do so, etc.

(2) H. REIMAN DUVAL (Rec., 3189-3200) etc. This witness was the President of the Florida Central & Peninsular Railway, whose Atlantic terminus was at Fernandina, Florida.

Mr. Duval testifies he was with Mr. Cutting at Washington, when an arrangement was made to have Captain Carter remain at Savannah, if he wanted to do so. Mr. Duval also testifies that Captain Carter had an opportunity to save $375,000 to Greene and Gaynor, in freight on stone, by simply expressing an opinion that it was practicable for them to get their stone from New York by sea, but that Carter refused to do this, and that this refusal lost to those con-

tractors, the $375,000 reduction of rates, which the railroad would have made, if Carter had said it was practicable for them to get the stone by sea, etc.

(3) W. G. Austin (Rec., 508-11; 674-5; 3339-75; 13037-54). This witness had been an inspector under Carter, and was in the employ of Gillette at the time he testified.

Austin testifies he inspected more than two hundred thousand yards of mattress work, done under the big contract at Savannah; that it was in accordance with the specifications to the contract, etc.

Austin had been a soldier, and had received from Congress a medal of honor for distinguished gallantry under fire.

After testifying in favor of Carter, Austin was dropped from the Government pay rolls by Gillette.

(4) T. J. Daniels (Rec., 539-48; 3395-3412). This witness had been an inspector of the fascine and mattress work, done at Savannah under Carter, and was in the employ of Gillette when he first testified.

Gillette, by assuring Daniels (who was then under his orders) that only military fascines (of which Daniels knew nothing) were in accordance with the contract, required Daniels to sign an affidavit that the fascines and mattresses he had accepted, when under Captain Carter's orders, were *not* in accordance with the contract. As soon as Daniels learned that Gillette had deceived him, and that the contract did *not* require military fascines, he recited those facts, and Daniels testified that all of the work done at Savannah had been in accordance with the specifications, *as they were understood by all of the employés in the District prior to the arrival of Captain Gillette*, and that the work was well done, etc. When Daniels testified in favor of Carter, he was dropped from the Government pay rolls by Gillette.

(5) F. S. Crisp (Rec., 13016-20). This witness (who is a son of the late Speaker of the House of Representatives) was employed at the United States Engineer Office at Fernandina, Florida, during the contract of 1896 for Cumberland Sound.

Crisp testifies he saw the mattresses; that they were well made; that he walked all over them; and there were no holes in them, etc.

(6) Thomas Lynch (Rec., 3339-42). This witness was an inspector on the Savannah work, under the contract of 1896. Lynch testifies the mattresses were properly built; that he walked all over them; that there were no holes in them, etc.

(7) T. H. Laird (Rec., 3461-72), etc. This witness was a Master of Steam Vessels, who had formerly been in command of the United States Inspection Yacht "Angler," and who, prior to that employment, had towed many of the fascines and mattresses which were used by Greene and Gaynor in the Savannah Harbor work.

Laird testified he has been a Master of Steam-boats, employed on the Savannah Harbor works, ever since 1873. He testifies the fascines built under Captain Carter were exactly like those built under

General Gillmore; that he has heard Captain Carter repeatedly order Cooper, Twiggs, and his other assistants, to carry out the specifications; to require the contractors to obey every order; and in case of refusal, to suspend the work, etc.

(8) J. R. GILMORE (Rec., 3527-34). This witness had been the Chief Clerk of Gen. Q. A. Gillmore, Carter's former commanding officer and predecessor. He testifies that the methods of sending out specification, etc., which Carter used, was that which had obtained in the office when Gen. Gillmore was in charge, etc.

(9) B. F. FINNEY (Rec., 2585). This witness is an expert chemist of Savannah, Georgia. He testifies that the specific gravity of the stone, which the complainant asserted was less than the contract required of 2.4, was determined by him, and that it really is 2.56, etc.

(10) M. P. USINA (Rec., 3535-37). This witness was Chairman of the Association of Pilots in Savannah Harbor, and had been a pilot in Savannah Harbor for thirty-nine years. He testifies that, when Captain Carter came to Savannah, there was only seventeen and a half feet to eighteen feet of water in the harbor, and that, after Captain Carter's work was completed, a vessel drawing twenty-six and a half feet was taken to sea. He also testifies as to the value to navigation of the guide piles driven by Captain Carter, etc.

(11) J. FITZGERALD (Rec., 3537-39). This witness was a Savannah pilot of thirty-nine years' experience. He testifies that the depth of water in Savannah Harbor was increased, during the time Captain Carter was in charge at Savannah, from seventeen and a half feet to twenty-six feet; that the guide-piling used by Captain Carter was of great benefit to the pilots in foggy weather, etc.

(12) H. H. LINVILLE (Rec., 3349-52). This witness has been President of the Board of Pilot Commissioners of Fernandina, Florida, ever since 1876. He testifies he saw the fascines made in the brush camps, for use at Cumberland Sound; that he knows they were choked, because he saw two or three men using chokers. He testifies that Marion Twiggs told him the work at Cumberland Sound was all right, etc.

(13) J. J. MCGIFFIN (Rec., 3384-90; 12476-93). This witness was mayor of Fernandina, Florida. He testifies he is familiar with the fascines and mattress camps of Greene and Gaynor; that he saw chokers, like capstan bars, being used, two men using chokers, and choking fascines tightly. He testifies he saw fascines put into mattresses; that they were laid close together, and that the mats were tied together with wire, which was forced through them with crowbars; that he saw a large mat on the beach, which had been lost by Greene and Gaynor, and which had come in through the breakers some six miles, and that it was still untorn and intact. He also testifies that he walked over the completed mats, which were good, etc.

(14) D. S. PATE (Rec., 8517-28). This witness is a lumber merchant of Chicago, who has had thirty-four years' experience with

timber and lumber. He testifies as to the price of loblolly pine logs in Georgia, etc.

(15) THOMAS R. LYON (Rec., 5336-39). This witness is a lumber merchant of Chicago, who has had thirty years' experience with timber and lumber. He testifies that saw logs can be hauled cheaper than brush logs; that they can be loaded and unloaded more cheaply; that a stumpage of twenty cents per thousand in the woods, would equal a cost of about $6 per thousand in Savannah, etc.

(16) J. D. CLARKE (Rec., 5339-40). This witness is a large dealer in timber and lumber of Darien, Georgia. He testifies as to the price of logs, etc., in Georgia.

(17) P. ROCHE (Rec., 5339-40). This witness is a large lumber dealer in timber and lumber of Darien, Georgia. He testifies that the prices of logs in Georgia, as given by Mr. Clarke, are correct, etc.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

No. 552.

OBERLIN M. CARTER ET AL., CROSS-APPELLANTS,

vs.

UNITED STATES OF AMERICA, CROSS-APPELLEE.

SUPPLEMENTAL BRIEF OF MR. J. B. FORAKER, SOLICITOR FOR OBERLIN M. CARTER.

MR. J. B. DAISH,
Associate Counsel.

JANUARY 8, 1910.

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OBERLIN M. CARTER ET AL., CROSS-APPELLANTS,

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SUPPLEMENTAL BRIEF OF MR. J. B. FORAKER.

I.

1. The statements of complainant's solicitor as to former adjudications against Carter in the Motion to Advance are not warranted by the facts:

On page 4 of the Motion to Advance this case, the solicitor for complainant states to this court as follows:

"The fundamental question of the guilt of Oberlin M. Carter of conspiracy and fraud with Benjamin D. Greene and John F. Gaynor, which is the basis of the right of the Government to recover the assets claimed as investments of the diverted trust funds, and awarded to the United States by the Circuit Court of Appeals, has been passed upon heretofore by numerous courts, notably in the following proceedings:

Verdict of guilty by general court-martial. Reviewed by Attorney-General Griggs and affirmed by President McKin-

ley September 29, 1899. See Carter case (22 Opin. Att'y Gen., p. 589).

Reviewed by the Supreme Court of the United States and sentence affirmed on *habeas corpus*. Carter *v.* McClaughry (183 U. S., 365).

Trial of Benjamin D. Greene and John F. Gaynor on indictment for conspiracy and fraud, with Oberlin M. Carter. Verdict of guilty, April 12, 1906, in the United States District Court, Southern District of Georgia. United States *v.* Greene *et al.* (146 Fed., 803).

Reviewed and affirmed by Circuit Court of Appeals, Fifth Circuit. Greene *et al. v.* United States (154 Fed., 401, 414).

Petition of Greene and Gaynor for certiorari denied by United States Supreme Court. Greene *et al. v.* United States (207 U. S., 596).

Decree in the present civil suit by the United States Circuit Court for the Northern District of Illinois (Rec., 358-383).

Reviewed by United States Circuit Court of Appeals in the present case, from whose decree on the merits Carter's cross-appeal is taken, and in whose opinion it is stated (Rec., 13,426): 'We are constrained to the belief that the evidence is decisive, not only of fraud perpetrated by the contractors, but of concurrence and participation therein by Captain Carter.'"

As to the "verdict of guilty by general court-martial" (which at that time had no power to compel civilian witnesses to testify or to produce books and papers), the solicitor for complainant omitted to state that the United States Circuit Court in this case said:

> "It does not appear that any part of the property sought to be recovered herein was procured with moneys accruing to Greene & Gaynor out of this latter contract [contract of 1896, as to which Carter was convicted by the court-martial of statutory embezzlement under section 5488, Revised Statutes].

> * * * The finding of the court-martial was that he [Carter] had committed that fraud. It must be borne in mind, however, that the evidence now before the court embraces not only that produced upon the court-martial proceedings, but a vast amount of additional evidence, and that the finding of that tribunal cannot, of itself, be deemed conclusive herein, upon any material point. Moreover, it should be borne in mind that it was held by so great a legal authority as ex-Senator Edmunds of Vermont, in a reference made by the Secretary of War to him for the purpose of an opinion, that the judgment of the court-martial was not sustained by the evidence adduced before it" (Rec., 359-360).

This finding was not disturbed by the Circuit Court of Appeals.

The solicitor for complainant further omitted to state to this court that the report of Attorney-General Griggs which led President McKinley to affirm the court-martial verdict was not based on the court-martial record alone, but also on *ex parte* statements which one Edward I. Johnson made to Attorney-General Griggs (Rec., 6368, 8406-07), which statements of Johnson, Carter had no opportunity to see or refute.

The solicitor for complainant states that "the fundamental question of the guilt of Oberlin M. Carter" was also "passed upon" by this court in the *habeas corpus proceedings* of Carter *v.* McClaughry (183 U. S., 365).

The statement of complainant's solicitor is not correct, as the question of "guilt" did not arise in that proceeding. This court held that the only question before it was the jurisdiction of the court-martial, and said: "*No evidence was adduced in or considered by the Circuit Court, and none is before us, nor is any inquiry into the guilt or innocence of the accused permissible*" (183 U. S., 381).

As to the statement by the solicitor for complainant that "the fundamental question of the guilt of Oberlin M. Car-

ter" was "passed upon" in the Greene-Gaynor proceedings at Savannah, it is sufficient to say that Carter was not tried in those proceedings, and hence his "guilt" could not have been passed upon therein.

As to the affirmance of the verdict against Greene and Gaynor by the Circuit Court of Appeals for the Fifth Circuit, the solicitor for complainant failed to mention to this court that the Court of Appeals, by a divided court, refused a new trial principally on the technical ground that exceptions to the charge of the trial judge were not taken before the jury had retired. (See 8th paragraph of the syllabus and p. 415 and foot of p. 415 and last paragraph of p. 418 of 154 Fed.)

As to the statement of the solicitor for complainant that "the fundamental question of the guilt of Oberlin M. Carter" was "passed upon" by this court when it denied a writ of certiorari to B. D. Greene and J. F. Gaynor, no comment is necessary. (207 U. S. 596.)

As to the decrees of the Circuit Court and the Circuit Court of Appeals, now before this court, we confidently submit that these statements in the unqualified manner in which they are made will be found by this court to be also unwarranted, and that in so far as there may be any excuse for such a statement in a modified or qualified form, the same will be found to be based on conflicting conclusions, inferences and deductions and not upon any concurring findings of fact.

2. The complainant is responsible for bringing up the entire Record. This is shown by the following statement from the brief of complainant on Direct Appeal, pp. 97-98. Direct Appeal, pp. 97-98.

* * * * * * *

> "An appeal was taken to the Circuit Court of Appeals by the United States, which carried up the whole record to that court.

"The defendants, O. M. Carter *et al.*, also cross-appealed to the Circuit Court of Appeals. The defense, however, had practically no trouble or expense connected with the taking up of the record. Their cross-appeal papers consisted merely of a petition for allowance of cross-appeal, the allowance assignment of errors and citation making twelve printed pages."

* * * * * * *

"Also an appeal was taken by the United States from the Circuit Court of Appeals to this court, which brought up the whole record to this court.

"The defendants, O. M. Carter *et al.*, also appealed to this court.

"The defense had practically no trouble or expense connected with the taking up of the record. Their cross-appeal papers consisted merely of a petition for allowance of cross-appeal, the allowance, assignment of errors and citation, making only a few printed pages."

Attention is called to this matter because it will be found that, in addition to the pleadings, opinions and decrees of the lower courts, it will be necessary to consider but a very small part of an unusually voluminous record, of which there might well have been a substantial diminution.

II.

The bill charges:

1. Conspiracy to defraud.
2. Numerous steps to be taken to carry out the conspiracy.
3. That all these steps were taken.
4. That more than $2,000,000 of fraudulent profits were made and divided—one-third to Carter.
5. That the Government was correspondingly damaged by reason of excessive and exorbitant prices paid for materials and by reason of the expense and use of inferior materials and inferior work.

III.

Both courts below held:

a. No conspiracy.

b. No irregularity in letting contracts.

c. No inferior materials used.

d. No inferior work done.

e. No money misapplied.

f. No controversy about prices of any material except brush mattresses.

g. No controversy about the amount used of any material except brush mattresses.

h. No controversy about the mode of use of any material except brush mattresses.

i. And both courts held in Carter's favor, as to the amount of brush mattresses used and the mode of such use.

k. All contracts were fully performed with the most efficient and highly satisfactory results.

Nevertheless both courts held, but on different and disagreeing grounds that the Government was entitled to recover notwithstanding the underlying facts were all found in Carter's favor. According to the Circuit Court, the facts remained (1) that because excessive profits had been made there had been "a raid on the Government," and (2) that these excessive profits had been divided with Westcott, who was Carter's father-in-law, and a partner of the contractors, and (3) that he had turned over to Carter, at one time and another, a large part, if not all, of what he had received; and that while there was no testimony to show that Carter had knowledge of Westcott's relations to the contractors, or the receipt by Westcott of any money from them, or that Carter had any knowledge of the fact that excessive profits were being made, yet as "a conclusion of law" Carter must be held to

have had knowledge and be required to return to the Government all he held that had come to him from that source; and

According to the Circuit Court of Appeals while "not satisfied" to grant a decree on the ground that Carter was chargeable as a "conclusion of law," yet because of the "settled facts above recited," "coupled with cumulative evidence *tending* to prove actual knowledge * * * of the excessive profits in the mattress work, and the divisions thereof with Westcott, and complicity in the fraudulent transactions of which * * * he acquired approximately one-third * * * we are constrained to the belief that the evidence is decisive, not only of fraud perpetrated by the contractors but of a concurrence and participation therein by Carter."

That court then indicates as follows the cumulative evidence to which it refers:

1. The claim that Carter should have discovered, if he did not sooner know it, by the time he had used the 350,000 square yards of brush mattresses estimated in the contract for the improvement of Savannah harbor, and had commenced the use of multiple mats, that the contractors were realizing an "exorbitant profit * * * measured by the square yard," as a result of which he should have exacted a reduction in price. As to this, the Circuit Court took the directly opposite view in the following language:

> "Nor is it apparent that there was anything suspicious in his [Carter's] not insisting on a reduction in price per square yard, for mats laid in multiple form as against individual mats, provided they came up to the specifications" (Rec., p. 373).

2. Therefore "no just ground for continuing same terms for the extension of the use of brush mattresses from 350,000 square yards to 1,363,372 square yards yielding to the favored contractors another great ratio of excessive profit."

3. The fact that this transaction was followed by "a

succession of contracts * * * under the * * * same form of specifications, etc."

4. "The fact alone of successive contracts thus let to these contractors, at prices far beyond the reasonable value of brush mattresses, whereby the United States was plainly defrauded in overpayments approximating $2,000,000—without proof of tenable excuse for the letting through emergency or other cause—implies either participation in benefits or collusion on the part of the officer having direction of the work."

It will be noted that 2, 3 and 4, of this "cumulative evidence" are neither facts nor findings of facts, but only mere inferences or deductions, and they will be found to be errors at that.

IV.

The Circuit Court erred in holding that the excessive profits that may have been realized indicated "a raid on the government."

When the Circuit Court held that it was proper and less expensive for the Government to buy brush mattresses by the square yard than by the cubic yard; and that aside from that fact the price of 95 cents per square yard named in the contract was a fair market price for brush mattresses at that time in that district and the lowest bid received at a fair, open letting; and that the extended use of brush mattresses from 350,000 square yards to 1,363,372 square yards was necessary to the efficiency of the work and within the discretion of Carter, and that practically as much was saved to the Government by that substitution in the use of stone and other materials as the increased amount of brush mattresses cost, it made it impossible to hold, consistently, that the excessive profits were at the expense and to the damage of the Government.

These specific findings should have led the court to hold that if there were excessive profits they were due to "a raid" by the contractors, *not* on the Government but, on their

laborers of which the trial court had conclusive and uncontradicted proof in the record, and that inasmuch as the wrong and damage done was to the laborers employed by the contractors and not to the Government which got full value received for all it paid out, there was in the Government no right to recover.

It is not claimed that there is any proof that Carter had knowledge that the contractors were paying peonage prices for the labor, and as a result making excessive profits, but if there had been, it could not have altered the case, since that was something for which he was not responsible and over which he had no control.

But if all this were otherwise, the Circuit Court erred in holding that Carter was chargeable with fraud as "a conclusion of law"—for fraud is not established in that way.

V.

The Circuit Court of Appeals recognized and sought to avoid this error when it said it was "not satisfied" to base its decree on that ground, and then, in an unsuccessful effort to find a better ground, proceeded to point out the suspicious facts that constituted "a chain of circumstances" that led to the "inevitable" conclusion that Carter was guilty of "concurrence and participation" in the fraud perpetrated by the contractors.

The following are the links in this so-called "chain of circumstances":

a. The use of 1,363,372 square yards of brush mattresses, instead of only the 350,000 square yards, named in the contract, after Carter must have known that the contractors were realizing an exorbitant profit.

If there be any one thing in all the record more clearly established than another by the evidence and by the findings of both courts below, it is that Carter in calling for bids by the square yard was following precedent; that in fact brush

mattresses had never as a rule been purchased in any other way, and that by so purchasing them he saved money to the Government as shown by the findings of the trial court, and that the price of 95 cents per square yard named in the contract for brush mattresses was the usual price at that time in that district and that it was within the discretion of Carter to use these mattresses in multiple, and that in view of the result of the experience he encountered and the developments that were made as the work progressed, it was his duty to so use them and to so use them to the full extent he did use them.

In fact it is clearly established that the exceptional success he achieved was due to this extended use of multiple brush mattresses more than to any other one thing. The testimony to this effect is overwhelming and the finding of both courts is to this effect.

But if all this be true, there is no ground whatever for the criticism of the Circuit Court of Appeals on this point, and this one link of suspicion must be dropped out of the "chain of circumstances," for with these facts established there could not be either wrongful conduct on the part of Carter or excessive profits at the expense of the Government; especially not when it is shown that the extended use of brush mattresses was in substitution for stone and other materials that would have cost as much, if not more, than the increased amount of brush mattresses; and especially in the second place if the use of stone and dredging as contemplated by the contract would not have produced satisfactory results, as there is every reason to believe they would not.

But the reason given by the Circuit Court of Appeals why this action was a link in a "chain of circumstances" involves a greater error if possible than the attempted use of the fact itself.

It is not that Carter used the increased amount, for that is expressly approved by the Circuit Court of Appeals (page 13,423), but the fact that he made use of the increased amount he found it necessary to call for and use at the same

price, *i. e.*, the contract price (page 13,423), "coupled with the continuance of like general specifications and estimates in subsequent calls for bids and letting of contracts * * * when linked with abnormal profits * * * and other circumstances."

We submit that Carter had no authority to require a modification of the contract price in the way suggested; certainly he is not chargeable with neglect of duty and a fraud upon the Government for not doing so when there is no evidence whatever in the record to show that he had knowledge of the fact that the contractors were reaping excessive profits. It is already shown that on this point the Circuit Court took a directly opposite view from the Circuit Court of Appeals (Rec., 373).

b. As to the letting of successive contracts, it is shown at page 56 *et seq.* of the main brief herein that the Circuit Court of Appeals must have been under a false impression as to the testimony on that point, because in the light of that testimony the letting of the successive contracts and what was done under them are an argument for just the opposite of what was claimed by that court.

That the Circuit Court of Appeals was under an erroneous impression as to these subsequent contracts appears plainly and conclusively from the following statement with respect to them: "The fact alone of successive contracts thus let to these contractors, at prices far beyond the reasonable value of brush mattresses, whereby the United States was plainly defrauded in overpayments approximating $2,000,000—without proof of tenable excuse for the letting, through emergency or other cause—implies either participation in benefits or collusion on the part of the officer having direction of the work."

It is shown in the main brief (page 56) that there were, all told, only four of these subsequent contracts and that the total amount of brush mattresses used under all of them

was but 791,840 square yards and that of this amount 213,334 square yards were used at 57 cents per square yard, thus leaving only 578,506 square yards, of which 564,608 square yards were used under the contracts of October 8, 1896, from the superintendence of which Carter asked to be relieved before a dollar was paid on account of them, and from which contracts both courts below held, notwithstanding the action of the court martial, that neither Westcott nor Carter, nor anybody for either of them, ever received any money whatever (Condensed Brief, p. 19).

It should also be borne in mind that one of these last contracts of October 8, 1896, was let in accordance with plans and upon estimates prepared by a board of six engineer officers of the highest standing and that they estimated that the brush mattresses called for in that contract would cost one dollar per square yard. The lowest bid received was $1.10 per square yard, but on the other contract where the plans and specifications were prepared by Carter, the contract price for the brush mattresses was only 95 cents per square yard.

Making these deductions it will be found that there is left of the brush mattresses used under these so-called subsequent successive contracts but 13,898 square yards.

Itwas from this relatively unimportant amount, therefore, if from subsequent contracts at all, that the Circuit Court of Appeals found that "overpayments approximating $2,000,000" must have been made by the Government on account of the alleged fraud perpetrated by the contractors in which Carter concurred and participated, for it is established by all the reputable witnesses that the price of 57 cents per square yard at which 213,334 square yards were furnished as above indicated, did not leave room for any profit whatever unles through peonage prices of labor, and probably no profits even in that case.

The error of both courts below was due to the fact that, finding the contractors had realized excessive profits, they

assumed they were due to exorbitant prices, named in the contracts, and, that they were therefore at the expense and to the damage of the Government instead of due to peonage prices for labor, which fully account for any excessive profits there may have been.

VI.

The plain truth is that it was not a "chain of circumstances" that led to the "inevitable conclusions" that were reached by the courts below, but just one fact that has warped and disfigured this whole case from the beginning in all the different courts, military and civil, where its merits have been considered, and that is the "cogent fact," to use the language of the Circuit Court of Appeals (page 13,427), "that Carter acquired the share of illicit profits turned over to Westcott."

It has been already shown that except for peonage prices there were no excessive or illicit profits and that, so far as peonage prices are concerned, the Government was not damaged and can not on any ground claim the fruits of such a wrong.

Such being the fact it is wholly immaterial for the purposes of this case where the money paid out by Carter to the contractors went after it was paid out, for the simple reason that the Government parted with all its right and title to the money and every part of it when it was paid out in discharge of its obligations under the contracts, honestly let and honestly performed, and in respect to which there has been no failure whatever of consideration.

This case should stop at this point, for if the Government was not damaged it has no right to recover anything from anybody under the bill and prayer filed in this suit, no matter how much money may have been made and no matter by whom it may have been made.

But waiving all this for the sake of argument, what are the facts with respect to the money paid to Carter?

In the first place, not a dollar was ever paid to him by the contractors or any of them; nor did he ever have any transactions with them except such as were legal and proper in connection with the performance by them of their contracts.

All the money he received that could have come from Greene & Gaynor was paid to him by his father-in-law, Robert F. Westcott, and there is not a scratch of a pen or a word of testimony in the entire record to show that Carter ever had even a suspicion that any of the money he received from Westcott had come to Westcott from Greene & Gaynor; and Carter testifies that he never had any such knowledge or suspicion until that claim was made long after everything had been received by him.

This makes important the relation of Westcott to the contractors and as reflecting on that relation makes important also the nature and circumstances of the payments by him to Carter.

The bill charges that these payments were all made either directly to Carter or to Westcott for the use and benefit of Carter and that Carter was therefore a direct participator in the fruits of the alleged frauds.

The Circuit Court rejected this view and held upon the testimony that Westcott was a partner with the contractors and found from that testimony that as such partner he received from Greene & Gaynor, from time to time, large amounts of money and that the money so paid to him was his one-third share of the profits, but refused to hold that Carter had any actual knowledge of the fact that Westcott was a partner and that he was receiving these payments, but held that as a "conclusion of law" Carter must, under the circumstances, be held to have had such knowledge.

The Circuit Court of Appeals held that upon the view it took of the case it was immaterial whether Westcott was a partner or not, and that in consequence it was not necessary

for it to make a finding upon that point and therefore neither concurred in nor disturbed that finding.

Thus the finding of the Circuit Court that Westcott was a partner of Greene & Gaynor stands as made, unaffected by anything found or held by the Circuit Court of Appeals.

This finding is so clearly in accordance with the weight of the testimony that the Circuit Court of Appeals would, no doubt, have concurred in the finding of the Circuit Court if it had deemed it necessary to pass upon the question, but because of the allegations of the bill and the fact that only one court has affirmatively so found, the attention of this court is called to the following testimony and facts established thereby in support of the finding of the Circuit Court that Westcott was a partner.

In the first place, he was of necessity either a partner, acting for himself, or a mere agent or "fence," acting for Carter.

In the first case Carter might have no knowledge, as he testifies, of the fact that Westcott was a partner, but in the second case Carter would, of necessity, have full knowledge.

If Westcott was a partner, either secretly or openly, it does not follow from that fact alone that the Government is entitled to recover in this suit, for it remains that to entitle the Government to recover it must still be shown that it was, in fact, defrauded and damaged; and if the contract prices were legitimate and the materials and work in accordance with the contract, then the Government was not damaged in any way by anybody.

Coming now to the main transactions between Westcott and Carter, they are all shown by Carter's diary entries and other memoranda and, in so far as necessary, fully explained by his testimony.

McPherson & Nelson, the expert accountants who examined all books, papers, accounts, memoranda and data of every kind, introduced in evidence in this case, testified that

these memoranda and diary entries made by Carter are truthful and correct; and that they show that Carter had no interest in, benefit from or control over any of the money received by Westcott from the contractors, and that Westcott's books show that all such money was received by Westcott and deposited by him in bank or with his brokers to his own credit and, from time to time, invested and re-invested by him for his own use and benefit, and that he collected and used for his own benefit and purposes all the coupons, dividends, interest and income arising therefrom without either consulting Carter or accounting to him therefor in any way whatever.

VII.

Speaking of these transactions now in a more detailed way, attention is called to the fact that:

1. The first advancement was made in 1891 to Carter's wife. It was for the substantial sum of $50,000, but the testimony shows that Westcott had, before that time, advanced $70,000 to Mrs. Conquest, another married daughter. In view of his ability to make such an advancement and in view of all the circumstances attending the making of it the record presents no excuse for doubting the genuineness of this gift; therefore, not because it needs it, but as a part of the history of this branch of the case, attention is called to the confirmatory testimony showing the settlement between Westcott and Carter of Mrs. Carter's estate after her death, and the account therefor by Westcott, to whom the custody of the estate had been turned over by Carter, immediately after the death of his wife, down to the last check for $489.86, dated May 2nd, 1893, with diary entries and testimony of Carter, all uncontradicted and all verified and confirmed by both Nelson and McPherson. There is nothing in all this record to indicate guilt, but just the contrary.

2. The payments to Carter during the year 1893 are small in amount and are of the same general character.

According to the bill and the testimony of the Government's expert accountant, Edward I. Johnson, Westcott received during this year of 1893 from Greene & Gaynor as agent of Carter and for Carter's use and benefit and with Carter's full knowledge, $205,418.15, every cent of which was profit (see page 20 main brief). The testimony of McPherson & Nelson shows that all this sum, in so far as it was invested, was invested by Westcott in his own name without any reference whatever to Carter and that all the proceeds of such investments, in the way of coupons, dividends, etc., were collected by Westcott and used by him for his own personal benefit and purposes without any regard whatever for Carter.

This, of itself, should be enough to show that if Westcott received this vast sum he must have received it without the knowledge of Carter or at least without Carter having any claim of any kind upon it, or any interest in it, for if he received such a sum for Carter's use and benefit with Carter's knowledge we might expect to see a large distribution by Westcott to Carter, but instead we find that during this year of 1893 Westcott's gifts and payments to Carter amounted, in the aggregate, to but $6,515 and that $1,500 of this was for Mrs. Carter's portrait, and that $3,400 was Tow Boat stock that had been purchased by Mrs. Carter in 1891 or 1892.

3. During the year 1894 Westcott is charged in the bill and by the testimony of E. I. Johnson with receiving from Greene & Gaynor $253,447, all profit; but according to all the testimony Carter received from Westcott during this year an aggregate sum of only $10,000.

The items making up this sum are fully set forth in Carter's diary and memoranda and, in so far as necessary, fully explained in his testimony. No one contradicts this testimony on any point while McPherson & Nelson directly and unqualifiedly confirm it.

It is further shown that during this year of 1894, as during the preceding year of 1893, Westcott was investing and re-investing all his funds in his own name and collecting and using for himself and his own purposes all the coupons, dividends, interest and income of every character without consulting Carter, and that he did nothing for Carter during this whole period of two years except to dole out to him in the manner shown, $3,515 in 1893, when Westcott received $205,418.15 and $10,000 in 1894 when Westcott received $253,447, or $16,515 in two years out of a total of $458,865.93.

The mere statement of these figures is enough to negative the idea that Carter was interested in any way in the money Westcott was receiving, much more to negative the idea that Westcott was acting as a mere "fence" and that all he received was, in fact, Carter's and that Carter had full knowledge of all the facts.

4. The gift of the 8th Avenue property to Carter at the beginning of 1895, which had cost Westcott when he bought it $39,819.75, was a substantial advancement and the allowance of $1,000 per month for that year was a substantial allowance but, in view of the fact that Westcott was just starting abroad to be absent indefinitely, as it turned out about 16 months, and that he put Carter, by general power of attorney, in control and management of all his business during his absence, and in view further of his repeated promises to advance to Carter Mrs. Carter's share of his estate, all Westcott did was nothing more than might have been expected.

But whether it was or not, there is nothing whatever connected with any of the transactions of this year to indicate that Westcott was acting for Carter or that Carter had the slightest suspicion that Westcott was a partner with Greene & Gaynor or that any money or property Westcott had turned over to him had come from that source, for the testimony shows that Westcott was abundantly able without any such help to do all that he did do.

5. But whether this advancement of the 8th Avenue property was large or small, reasonable or unreasonable, suspicious or the contrary, is absolutely immaterial if it was a gift, so intended by Westcott and so understood by Carter.

6. That it was a mere gift is shown by the fact that the transaction was such on its face, and also by the further fact that, when in 1897, Carter, having bought and paid for the one-half interest in the Orange, New Jersey, property, to meet the expenses of his defense, sold that property back to Westcott for the same price ($63,000) he had paid for it, and in consideration of the favor done him by Westcott in thus purchasing the Orange, New Jersey, property, not only conveyed that property to Westcott, but also, at the same time, at the request of Westcott, reconveyed to Westcott the 8th Avenue property without any additional consideration whatever.

If both Westcott and Carter had not regarded the original conveyance to Carter, in January, 1895, of the 8th Avenue property as a mere gift, Westcott would not have demanded a reconveyance to him nor would Carter have complied with such a demand if it had been made.

7. But if that property was conveyed to Carter as a gift, in 1895, it was not given to him on account as a part payment of illegal gains received by Westcott from the contractors for the use and benefit of Carter. The fact that Westcott would demand a reconveyance of this property, without any consideration whatever, except only the favor he was doing Carter to put him in funds at a time when he needed them, by buying back from him the Orange, New Jersey, property at the same price Carter had paid him for it, would seem conclusive that Westcott never regarded the conveyance to Carter in 1895 of the 8th Avenue property otherwise than as a gift, as Carter testified Westcott said it was, and the fact that Carter, without any hesitation, reconveyed it to him without consideration, is the strongest kind of evidence that Carter never regarded himself as having any claim upon the property except only as a gift.

Surely neither of these men could have so acted with respect to this property as each of them did if either had regarded the property as the proceeds of money paid to Westcott for Carter's use and benefit, or in other words, as Carter's property.

8. Moreover the Orange, New Jersey, property transactions, considered alone, refute the claim of fraud on the part of Carter since, in the first place, Carter bought and paid for this property to the last dollar out of money that belonged to him, most of which had come to him from his wife's estate, something he surely would not have done had Westcott, at that time, been the holder, to Carter's knowledge, of hundreds of thousands of dollars collected for Carter's use and benefit; this is further confirmed by the fact that when Carter needed money he sold this property back to Westcott, for the same price he had paid, with the 8th Avenue property added.

9. All these facts are entirely inconsistent with the theory of the Government that at that time Westcott held money and the proceeds of investments of money which belonged to Carter, amounting to more than $500,000, after deducting all previous advancements.

10. If the money that was paid to Westcott was Carter's money, Carter would have simply demanded "on account" such amounts as he found it necessary to use, and he would not have paid back any money or re-conveyed any property, for there would still have been a balance of hundreds of thousands of dollars to his credit in Westcott's hands. The mere fact that there was this purchasing and re-purchasing, conveying and re-conveying of real estate, with an accurate accounting with respect to the same on a purely business basis, would surely in any other case be regarded as conclusive evidence of innocence on the part of Carter.

11. It is also strong testimony in Carter's favor that when Westcott gave him the 8th Avenue property, January, 1895, the only contract still unfinished was the Savannah harbor

contract, and that was nearing completion and was practically completed in July, 1895, a few months after Westcott left, and almost a year before he returned, and that during all this period there was no money paid by the contractors to either Westcott or Carter, and from July, 1895, until July, 1897, two full years, no payments were made by Carter to the contractors of which it is now pretended that Carter, Westcott, or anybody else except the contractors themselves, received any part.

12. Without amplifying, the same may be said in a general way of the payments made by Westcott to Carter during 1896-1897, that has been said of the payments of 1893, 1894, and 1895, as pointed out in the main brief herein (pages 155-163), except that during 1896, Westcott commenced for the first time to make any material use of coupons clipped from the bonds which he owned in making these payments.

13. Another convincing proof that Carter had no interest in any money that may have been paid to Westcott by Greene & Gaynor is the fact that so long as Westcott had control of the bonds belonging to Mrs. Carter's estate he carefully kept a separate account of the coupons clipped from the same, accounted therefor to Carter and paid over to him the amount of the same; while at the same time he was collecting and appropriating to his own use the money from the coupons from other bonds, all of which was passed to his own personal account. This is shown by the testimony of McPherson and Nelson and by undisputed documentary evidence and there is no evidence to the contrary.

This is shown by Defendants' Exhibit No. 98 (Rec., 9603), the accuracy of which has never been questioned; said exhibit is as follows:

DEFENDANT'S EXHIBIT 98. 1/19/05. R. H. W.

Collection of Coupons by Westcott.

Date.	Total.	From Mrs. C.'s bonds.	From bonds in court.	From bonds admittedly R. F. Westcott's.	Paid to C.	Kept and used by W.
Nov., '93..	$1,450	**$375**	$475	$600	**$375**	$1,075
Dec., '93..	1,125	**650**	175	300	**650**	475
Jan., '94..	2,505	**125**	1,100	1,280	**125**	2,380
May, '94..	975	**375**	600	.....	**375**	600
June, '94..	1,350	**650**	700	....	**650**	700
Nov., '94..	1,412.50	**375**	1,037.50	.....	**375**	1,037.50
Dec., '94..	1,350	**650**	700	.....	**650**	700
Jan., '95..	2,092.50	**125**	1,967.50	.....	**125**	1,967.50

14. But there is more convincing evidence still in Carter's favor in the fact that after the trouble arose and while the Board of Engineers was sitting in New York, investigating the charges that Carter had been corruptly interested with the contractors in the work which he had been supervising, and while the papers were full of sensational accounts of the proceedings before this Board, Carter, within a few squares of this Board, received and receipted for the bonds, stocks, and deeds turned over to him in Mr. Root's office. No one has ever charged Carter with lacking either sound common sense or good judgment, but surely he would have to be without either to be capable of engaging in such a transaction, under such circumstances, if he had the slightest suspicion that what he was receiving was of fraudulent origin, the very thing which, at that very moment, he was defending himself against.

15. Westcott's testimony is not in the record as against O. M. Carter, but if it were it is utterly false and downright perjury in so many particulars, manifest on its face, and so proven by McPherson, Nelson, Hamilton, Flagg, Reed, and others, that it could not have weight, aside from the fact that Westcott was trying to comply with the terms imposed upon

him by the Government as the price of his immunity from prosecution, enough of itself to destroy his credibility except where he is uncontradicted and where he is confirmed by other testimony which is, of itself, clear and sufficient; and Westcott is not only without such confirmation, but he is flatly contradicted by Carter, McPherson, Nelson, Hamilton, Flagg, Reed, and a number of others, and over and over again by himself.

Respectfully submitted,

J. B. FORAKER.

WASHINGTON, D. C., *January* 8, 1910.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

No 552.

OBERLIN M. CARTER ET AL., CROSS-APPELLANTS,

vs.

UNITED STATES OF AMERICA, CROSS-APPELLEE.

Index to a Few of the Many Erroneous or Misleading Statements in Complainant's Condensed Brief, with References to the Findings of the Courts, and the Evidence Showing the Truth About Such Statements.

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Solicitor for Oberlin M. Carter.

MR. J. B. FORAKER,
Of Counsel.

JANUARY 13, 1910.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1909.

No. 552.

OBERLIN M. CARTER ET AL., CROSS APPELLANTS,

vs.

THE UNITED STATES, CROSS APPELLEE.

The cross-appellants having received a copy of the condensed brief of the United States, and observing erroneous and misleading statements therein, file the following references to briefs and compilations heretofore filed, entitled:

INDEX

To a Few of the Many Erroneous or Misleading Statements in Complainant's Condensed Brief, with References to the Findings of the Courts, and the Evidence Showing the Truth About Such Statements.

NOTE.—"Ref." means the book, "References to the Evidence."

Pages 2-13.

For the findings of the Courts as to the allegations of the bill, see (Ref., pp. 1-28).

Page 14.

That no divisions were ever made by the contractors with Carter or for his benefit, see (Ref., pp. 17-21).

Pages 19-20.

That Carter did not have possession of the securities until Westcott gave them to him in October, 1897, see (Ref., p. 26; 408 *et seq.*)

Page 23.

That the finding of the courtmartial was not justified by the evidence before it, see (Supplemental Brief, pp. 2-3).

Page 24.

That ex-Senator Edmunds was employed by the Secretary of War on behalf of the President, see his Report (Rec., 8982).

Page 39.

That Carter was found innocent of the conspiracy charged in the bill, see (Ref., pp. 2-10). See also (Condensed Brief, p. 3, *et seq.*).

Pages 40-42.

That there was no finding of fact that Carter was guilty of fraud or had participated in any fraud, but a mere erroneous conclusion of law, see (Supplemental Brief, p. 6, *et seq.*). See also (Condensed brief, p. 3, *et seq.*).

Page 42.

That the statements as to former adjudications of Carter's "guilt" are not correct, see (Supplemental Brief, pp. 2-4).

Page 47.

That Westcott was a secret partner with Greene and Gaynor unknown to Carter, see (Condensed Brief, pp. 15-16). See also (Ref., pp. 17-21, 23, 28).

Page 49.

That the deposits of currency made by Carter in 1893 were given to Carter by Westcott in settlement of Mrs. Carter's estate is shown by the finding of the trial court "It may be as defendant insists; that it came as a part of his wife's estate and was as such delivered to him by Westcott" (Rec., 386).

Page 53.

That the Circuit Court of Appeals held the $37,114.75 of securities belonged to Carter, see that Court's decision giving Carter credit for those securities (Rec., 13429).

Pages 55-58.

There is no conflict between the evidence and the answer. The complainant's solicitor omits to state that the answer

expressly says "Except that a part of the money given by said Westcott to this defendant's wife may have been used to partly pay for said property" (Rec., 133).

Pages 63-66.

That E. I. Johnson's statements are not truthful, see (Main brief, pp. 99-101; 107-126).

Pages 69-70.

That this alleged division is untrue, see (Main Brief, p. 109).

Page 71.

That the alleged investment of $15,000 is not true, see (Main Brief, p. 110).

Page 76.

That the alleged adjustments of E. I. Johnson are unreliable and that most of them were never even offered in evidence, but simply read into the Record by complainant's solicitor, see (Ref., pp. 417-18).

Page 79.

That there was no "jump in prices," see (Ref., 11-12; 249, *et seq.*).

Pages 80-91.

That Carter did not receive anything from the contractors as alleged, see (Main Brief, pp. 87-89). See also (Ref., pp. 17-18).

Page 95.

That the deficiency judgment against O. M. Carter was error, see (Condensed Brief, pp. 9-12).

Pages 101-106.

That the work was completed successfully within the estimates, see the findings of the lower courts (Rec., 359; 13423), and also (Ref., p. 31, *et seq.*).

Pages 107-111.

That the work contemplated by the project was actually done, see (Ref., p. 37-40).

Pages 112-117.

There was no diverted money—all went to the purpose for which it was appropriated, see (Condensed Brief, pp. 17-18). See also (Ref., 37-40).

Pages 118-126.

That Carter reported the increase of mattress work, see the specific finding of the Court (Rec., 369). See also (Ref., pp. 14-15; 119).

Page 126.

Ex-Senator Edmunds did not report against Carter as stated in complainant's brief, but criticised him only on three minor matters on all of which Carter was found innocent by both Attorney-General Griggs and President McKinley and of which Carter is now conceded to be innocent, see (Main Brief, pp. 99, *et seq.*).

Page 129.

That the use of three mattress designs was found to be proper, see (Ref., pp. 13; 209).

Page 130.

That the drawings submitted by complainant are misleading and unfair, see (Ref., pp. 512-13; 260-65, *et seq.*).

Pages 131-136.

That multiple mattresses were permissible under the contracts and of great value to the Government and did not effect any saving to the contractors, see (Rec., 371-73). See also (Ref., pp. 14; 126, *et seq.*)

Pages 139-143.

That Captain Black admitted he made no estimate as to the mattresses Carter actually built but estimated on a sample mattress made and sunk by Gillette during Carter's absence and which was admittedly improperly built, see (Main Brief, pp., 71-72). See also (Ref., pp. 200-209).

Page 147.

That the witnesses for complainant based their estimates of cost on peonage labor at 16 2/3 cents a day, see (Main Brief, pp. 66-71).

Page 152.

Lieut. Rees, whose character complainant's solicitor attacks, is now Major Rees, an officer of unblemished reputation and great ability, now division engineer at Chicago in charge of one of the greatest river and harbor districts of the United States.

Page 154.

Complainant's solicitor omits to state that by permitting the contractors to take brush off the reservation Carter got the land cleared free of cost to the United States; he further omits to state that the brush was of no value to the government and that the cost of logs or brush *in the woods* was nominal, the great cost being the labor of taking logs or brush from the woods to the site of the work (Ref., pp. 220-36).

Pages 155-156.

Complainant's solicitor omits to state that the Circuit Court held as follows: "The evidence shows that while small quantities of brush fascines can be readily obtained in almost any locality, large quantities are hard to get. It may well be that in volume such as was used in the 1892 contract, a very considerable area would be devastated. The evidence shows this to have been the case" (Rec., p. 370);

and complainant's solicitor further omits to state that the evidence is uncontradicted that the brush haul under the 1892 contract was as great as 95 miles (Rec., p. 3464).

Page 157.

Complainant's solicitor omits to state that at Augusta, Ga., Gillette paid 48 cents a cubic yard for fascines and 75 cents a cubic yard *more* for making them into mattresses (Ref., p. 518).

Pages 161-164.

Mattresses had never been bought by the cubic yard but always by the square yard. (Rec., 368). See also (Ref., pp. 11; 240).

Page 165.

There was no "jump in prices." See (Ref., pp. 11; 249).

Page 172.

Complainant's solicitor fails to state that not only the lower courts but a special board of engineers held that Carter had increased the channel depth in Savannah Harbor by 9 feet (Rec., 359). See also (Ref., p. 36).

Page 173.

Complainant's solicitor fails to state that the uncontradicted evidence shows Greene and Gaynor would have had a monopoly of the harbor work if multiple mattresses had been called for in the specifications (Ref., p. 149). See also (Ref., p. 14; 126).

Page 184.

The officers of the Corps of Engineers who are charged by insinuation with having testified falsely in Carter's behalf because they were Carter's personal friends are all men of the highest character and are as follows: Gen. Craighill, former Chief of Engineers; Gen. Marshall,

present Chief of Engineers; Gen. Ludlow; Colonel Quinn; Colonel Handbury; Colonel Willard; Colonel Bixby; Colonel Rossell; Colonel Mahan; Colonel Townsend; Colonel Goethals; Major Rees and Major Burgess.

The slur of complainant's solicitor is purely gratuitous, there being no evidence whatever tending to discredit in any way any of these officers.

Page 187.

Complainant's solicitor omits to state that Colonel Quinn expressly testified of Carter's jetties and other work "they didn't require much repair"; "we put in about 12,000 cubic yards of rock to bring up some stone jetty that was submerged"; "they are still standing in apparent good order" (Rec., 4503-04). Complainant's solicitor seeks to insinuate that Col. Quinn testified, that $847,658.94 were expended on repairs to Carter's work, but the fact is that Col. Quinn testified Carter's work did not require any important repairs (Rec., 4504) and the large sum named was expended mainly on another project. In June, 1902, a new project for 28 feet was adopted (Rec., 4508); and on this project there were expended $202,067.65 during the next fiscal year ending June, 1903 (Rec., 4505), and $547,377.06 during the next fiscal year ending June, 1904 (Rec., 4507), a total of $749,445.01.

Page 188.

The character of Gillette is shown by his own testimony and actions. See (Main Brief, p. 66-69). See also (Ref., pp. 510-519).

Page 190.

That the three mattress designs cost the same per square yard, see (Ref., p. 13; 209 *et seq.*).

Page 192.

That the advertising was properly and lawfully done, see Ref., p. 11; 74 *et seq.*).

Page 195.

Complainant's solicitor omits to state that Carter not only told Greene and Gaynor but also told their competitors that he expected to use the third design of mattresses. (Rec., 365-63). See also (Ref., pp. 13-14; 68 *et sec.*)

Page 198.

In charging collusion, complainant's solicitor fails to state that the trial court said "As is not at all uncommon, there appears to have been an attempt on the part of the bidders to stifle competition. Whether Carter knew of this is not shown. Certainly there is nothing in the record with regard to the opening and letting of the bids in and of itself calculated to cast suspicion upon Carter's conduct" (Rec., 368).

Page 198.

The person alleged to have committed the forgeries is M. A. Connolly, who, *as complainant's witness,* denies it. Connolly was a United States Commissioner appointed by Judge Emory Speer, who, he says, was his friend (Ref., 508-09).

The only witnesses who testified that forgeries were committed are Carvalho and Sterly, who testified as experts.

For evidence that Carvalho could not tell who wrote the signatures see (Witnesses, p. 6).

That Sterly admitted on the witness stand he defrauded the government by getting money through deceiving Colonel Goethals, and that he committed perjury to get it, see (Witnesses, 37-38).

There is not the slightest evidence that even if Connolly did sign some one else's name to any paper that Carter ever knew or suspected anything about the matter.

All of which is respectfully submitted.

JOHN B. DAISH,
Solicitor for Oberlin M. Carter.

January 13, 1910.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 551.

UNITED STATES OF AMERICA, APPELLANTS,

vs.

OBERLIN M. CARTER ET AL., APPELLEES.

No. 552.

OBERLIN M. CARTER ET AL., CROSS-APPELLANTS,

vs.

UNITED STATES OF AMERICA, CROSS-APPELLEES.

WASHINGTON, D. C., THURSDAY,
January 13, 1910—12 o'clock m.

The above-entitled cause came on for hearing at the above date.

Present on behalf of the United States: Marion Erwin, Esq., Special Assistant to the Attorney General.

Present on behalf of Oberlin M. Carter: J. B. Foraker, Esq., and John B. Daish, Esq.

Present, also, H. G. Stone, Esq., in his own behalf.

Mr. Erwin made the opening argument on behalf of the United States.

Mr. Stone made the argument in his own behalf.

ARGUMENT OF J. B. FORAKER, ESQ., ON BEHALF OF OBERLIN M. CARTER.

Mr. FORAKER: May it please the court:

In the first place, before entering upon the discussion of the case proper, I desire to correct what I conceive to be some misstatements made by the solicitor for the Government, first in his motion to advance this case for hearing on the docket, and secondly repeated in his brief filed only two or three days ago. I refer to what is found at page 4 of this motion. I read as follows:

> "The fundamental question of the guilt of Oberlin M. Carter of conspiracy and fraud with Benjamin D. Greene and John F. Gaynor, which is the basis of the right of the Government to recover the assets claimed as investments of the diverted trust funds, and awarded to the United States by the Circuit Court of Appeals, has been passed upon heretofore by numerous courts, notably in the following proceedings:
>
> "Verdict of guilty by general court-martial. Reviewed by Attorney General Griggs and affirmed by President McKinley September 29, 1899. Reviewed by the Supreme Court of the United States, and sentence affirmed, on *habeas corpus*.
>
> "Trial of Benjamin D. Greene and John F. Gaynor on indictment for conspiracy and fraud, with Oberlin M. Carter. Verdict of guilty, April 12, 1906, in the United States District Court, Southern District of Georgia. Reviewed and affirmed by Circuit Court of Appeals, Fifth Circuit.
>
> "Petition of Greene and Gaynor for certiorari denied by United States Supreme Court.
>
> "Decree in the present civil suit by the United States Circuit Court for the Northern District of Illinois."

If I understand these statements, they are to the effect that Oberlin M. Carter has been adjudged by all the tribunals here referred to and in the proceedings before the Attorney

General as guilty of conspiracy to defraud with these contractors named.

The record will show that he was convicted by the court-martial of frauds with respect to certain contracts entered into in October, 1896. Everything prior to that time was barred by the statute, and, on plea of the statute of limitations, was ruled out. He was found guilty there, among other things, of having embezzled a part of the money disbursed by him on account of those contracts. The record shows that he paid out five hundred and seventy-five thousand and some odd dollars on account of those two contracts just before he quit duty in that district. It is charged in the bill that he received one-third of the profits of that sum. The record will show, and the Circuit Court so found and so held, that before the court-martial (because at that time military tribunals had no power to subpœna civilians and enforce the production of books and papers) the record was entirely different from what it is here; and the record of the Circuit Court will show that although he was found guilty of having embezzled a part of that money, he never received a dollar of it—neither he nor Westcott; not a dollar of it. And the record also shows (and it is not necessary to go beyond the bill of complaint in this case to learn it) that there was no direct proof before the court, that he had participated wrongfully in any money paid out on account of those contracts.

In my main brief, at page 24, in what I have referred to as the fifty-ninth allegation of the bill, speaking of that matter, I refer to the fact that the orator says:

> "Yet nevertheless the evidence of conspiracy to defraud the United States entered into between the said conspirators in the letting of the contracts and in the doing of the work under them and the possession by Carter of so large an amount of securities from which he was enjoying the income, without any satisfactory explanation, furnished proof so plain of the guilt of said Oberlin M. Carter that he was

convicted by said court-martial, and sentenced to dismissal from the army, and to pay a fine of $5,000, and be imprisoned at hard labor for five years."

After reviewing the proceedings, that statement is made in the bill, showing (in accordance with the proof in this case) that there was no direct testimony to show that he ever got a dollar, either he or Westcott, from that payment of $575,000, and that he lost his place in the army, and lost his good name, and went to the penitentiary, and paid a fine of $5,000 upon a claim that was not supported by testimony, and as to which both the Circuit Court and the Circuit Court of Appeals find here there was no testimony to convict him.

I pass from that without further comment.

Mr. Justice WHITE: Senator, may I interrupt you there for one minute.

Mr. FORAKER: Certainly; with pleasure.

Mr. Justice WHITE: Referring to the statement you are now making: You say that none of these payments of money which the Government attempted to trace in this case were payments connected with the matter of which he was convicted in the court-martial?

Mr. FORAKER: None whatever. He was convicted before the court-martial, as that allegation in the bill indicates, upon circumstances that indicated that he must have in some improper way acquired a large amount of money because of the way in which he was living, and so forth, and so on. I will come to all that presently.

Mr. Justice WHITE: Yes; I do not wish to interrupt you.

Mr. FORAKER: But the Circuit Court finds that he received no money at all from the contracts of 1895. This is shown at pages 359 and 379 and the affirmance by the Circuit Court of Appeals at page 13432 of the record.

Mr. Justice WHITE: It finds that in this case, does it?

Mr. FORAKER: Yes; in this case the Circuit Court so finds.

The next proposition is that the fundamental question of conspiracy and fraud was passed upon by this court in the *habeas corpus* case of Carter *vs.* McClaughry. I read from the opinion by the Chief Justice, at page 381. This was a case where only the question of the jurisdiction of the subject-matter and of the parties was involved, and the further question whether or not the court-martial had exceeded its power. Nothing else at all was considered. The Chief Justice said, in his opinion:

> "No evidence was adduced in or considered by the Circuit Court, and none is before us, nor is any inquiry into the guilt or innocence of the accused permissible."

As to the certiorari case, there is simply an entry that the writ is denied. There is no pretext—there could not be, with the record before him—that there was anything in it to indicate that the fundamental question of conspiracy, etc., had been passed upon.

Now in this case, coming to that:

The Circuit Court of Appeals, which made a more harsh decree against Captain Carter than the Circuit Court, said this with respect to conspiracy, which it is there stated had been passed upon adversely to him: After reviewing the findings of the Circuit Court at great length, stating them one after another in detail (and I will presently take them up and state them), and after making some discussion of its own and some findings of its own, the Circuit Court of Appeals said:

> "We concur, therefore, in the view expressed in the opinion filed by the trial judge, that the charge of conspiracy between Captain Carter and the contractors to defraud the United States, under the contracts referred to, is (*a*) neither established by direct evidence, (*b*) nor can such charge be upheld under the testimony alone of methods adopted in making specifications, advertising for bids, treatment of proposed bidders, or letting contracts, (*c*) nor under

> one or the other several branches of testimony reviewed in the opinion, considered independently of the entire chain of circumstances."

In other words, I shall undertake to show presently that every fact in this case, from the beginning to the end of it, had been found affirmatively by both courts in favor of Captain Carter; and that in so far as there is any decree against him, it is based by the court itself upon the chain of circumstances, which, it will be easy to point out so that the court will recognize the correctness of my contention, is based upon error all the way through.

There is no finding of fact against him—not one. Every finding of fact is for him. Yet after all the facts that were agreed to in his favor, there was then a decree against him in both courts, but on grounds that disagreed. There was no agreement of the two courts as to the ground upon which it should be based. In the Circuit Court the holding was that there should be a decree against him because there had been a raid on the Government; great profits had been made (I will show what that "raid" is, how the profits were made, etc.); and that if he did not have knowledge (and they did not find that he had any; on the contrary, the testimony failed to show that he had any knowledge), the Circuit Court said, "Nevertheless, as a conclusion of law, he must be held to have had knowledge; as a conclusion of law he ought to have done thus and so."

The Circuit Court of Appeals, rightly recognizing that fraud cannot be established in that way, sought to avoid the error of the Circuit Court by saying: "We are not satisfied to rest a decree in favor of the Government against Carter upon a conclusion of law." And then they proceeded to point out other grounds which I will come to in a moment. And in doing so they held directly the opposite of what the Circuit Court had held as to one of the chief grounds of suspicion.

And just now, if your Honors please, commenting on that

with the idea of possessing the court if I can at the outset with the idea that this case is not as it was stated here by the representative of the Government, I think I will be able to show that certainly the record is not as stated by him in these briefs to which I have referred.

That is not all. While I am about that, let me say this: I have practiced law forty years or more; and I have never, in all of that experience, come across a bill of complaint in equity where there was such an absolutely reckless disregard of the truth in the allegations that are made, nor such disregard of what I conceive to be the truth in the briefs that are printed referring to the record. Let me illustrate what I mean, so that in this case, which is of the most vital importance to my client, we may have a fair start, and everybody will be on his guard.

At page 4 of the brief filed only a few days ago by the solicitor for the Government he says, with respect to the advertisements that were made in this case:

> "The bill charges that Carter was vested as such officer 'with power, duty and discretion in causing to be fixed and fixing the time such advertisements would be published prior to the opening of bids.'
>
> "The answer of O. M. Carter denies this allegation and says:
>
> "(*e*) 'He admits that when ordered to submit for consideration a form of advertisement, it became necessary for him to propose a time for the opening of proposals for the work, but the approval or disapproval of his suggestion rested with the War Department, by whose orders he was governed.'
>
> "The issue on this point is one of the hotly contested issues in the case. The evidence that the time during which these very large contracts were advertised was wholly inadequate and resulted in little or no competition and exorbitant prices, could hardly be controverted because it is documentary, but Carter to relieve himself of responsibility for it has attempted to throw the responsibility on his superior officers in the War Department, who he claims approved the

suggestions made by him as to fixing the time. The Government contends that both by the regulations and by the practice the responsibility for fixing the length of time the advertisements were to run was placed upon Carter.

"The regulations and the evidence on this subject are treated fully in appellant's main brief," etc., etc.

At record 363, which is the opinion of the Circuit Court (I have the opinion of the Circuit Court and also the opinion of the Circuit Court of Appeals printed as an appendix to my main brief), I read what is found there by the Circuit Court.

Mr. Justice HARLAN: What page?

Mr. FORAKER: It is page 363, which indicates that it is the opinion by the trial judge—that is, page 363 of the record.

Mr. Justice LURTON: What book are you using, Judge Foraker?

Mr. FORAKER: I am using my main brief.

Mr. Justice WHITE: There are so many briefs that it is a little confusing.

Mr. FORAKER: This is the one entitled "Brief of Mr. J. B. Foraker." Yes; I want to say to the court, with some apology, that we were rushed a little; I wrote a main brief, and then I wrote a condensed brief; and then, since I came here and saw some of these things, I have written a supplemental brief. The supplemental brief is very short.

Mr. Justice WHITE: I do not find the main brief. Here is one designated as "Brief of Mr. J. B. Foraker."

Mr. FORAKER: That is it.

Mr. Justice WHITE: That is your main brief?

Mr. FORAKER: That is the main brief; and you will find in the appendix to it the opinion of the Circuit Court and also the opinion of the Circuit Court of Appeals.

Mr. Justice HOLMES: I am sure you gave the wrong page. You said "page 363," if I understood you.

Mr. FORAKER: Page 363—yes. I mean page 363 of the record, and also page 363 of my brief.

Mr. Justice HOLMES: What page of your brief can we turn to?

Mr. FORAKER: It is in the appendix, and the appendix bears the paging of the record; so when it is page 363, or anything near that, it is the opinion of the trial court; and page 13414, or anything near that, will indicate that it is the opinion of the Circuit Court of Appeals.

At page 363 (I do not want to spend too much time on that) your Honors will find that the trial judge discusses what the testimony is on the subject of advertising, and that the conclusion is entirely in favor of Captain Carter — that the advertising was sufficient and full. I will not take the time to go through it, because time is pressing.

Mr. Justice WHITE: That is the finding of the Circuit Court?

Mr. FORAKER: Yes; the finding of the Circuit Court; and the Circuit Court of Appeals makes the same sort of finding. That is, it adopts that.

At page 6 of this brief of the solicitor for the complainant we have another statement of the same character. I am calling attention to these matters now simply to put us on our guard with respect to them. He says:

> "As an illustration of such recommendations made by Carter for accepting bids received. See Carter's recommendation to the Chief of Engineers that the bid of D. V. Howell, who bid 67 cents per cubic yard for mattresses for Brunswick Harbor contract of 1889, be rejected, for 'informalities,' and that the bid of Chas. C. Ely, of $1.35 per cubic yard, be accepted. Ely, for Greene & Gaynor, thus getting the contract."

If your Honors will turn to the citations there made in the record (I am not going to stop to read them now) you will find that the man who bid 67 cents was what they called a "failed bidder." He had had a contract, and had failed; and under the rules of the War Department it was the duty

of a local engineer to report that fact to the War Department, and not award him a contract unless they, here at Washington, saw fit to overrule him. So that when his bid came in, that report was made, and nothing else, and nothing beyond that. The award at $1.34, made to this other party, was an award made to the lowest bidder—to the lowest acceptable bidder. The record will show that all the facts were reported to Washington. And with respect to all these contracts, let it be said at the outset that Carter, as the local engineer officer, had no final decision. He reported everything to Washington. Every contract, every form of specifications, every advertisement, everything of that nature, had to be reported here, and had to be here approved, and was here approved in every instance.

I might go on—I have noted quite a number of others—and point out a dozen others that I have run through, only today, similar in character to that. I will point out one other before I turn away from it.

At page 184, under the sub-head "Experts," occurs the following:

> "A number of officers from the Corps of Engineers testified in Carter's behalf as to customs of the engineer service, or as experts on construing specifications or projects. They were in the main personal friends of Captain Carter, who hoped he was innocent, and did the best they could for him."

Let me read your Honors the list of names of persons who testified in Carter's behalf, or made official reports which were used, with respect to the engineering features of the case. I have it before me:

General Thomas L. Casey; General Alexander Mackenzie; General W. P. Craighill; General P. C. Hains; General William Ludlow; General William L. Marshall; Colonel H. M. Adams; Colonel W. S. Stanton; Colonel W. T. Rossell; Colonel W. H. Bixby; Colonel D. D. Gaillard; Colonel J. B. Quinn; Colonel T. W. Symons; Colonel C. McD. Townsend;

Colonel W. M. Black; Colonel T. H. Handbury; Colonel J. H. Willard; Colonel F. V. Abbot; Major T. H Rees; Major F. A. Mahan, and Major Harry Burgess—all of the Corps of Engineers. Some of these may have been friends of Carter, but they were all men and officers of the highest character and truthful witnesses.

And then a number of civil engineers—he does not say they were "personal friends;" but the mere reading of these names is enough, I know, to this Court, to every member of which all these names must be familiar as the names of the most distinguished and reliable of all the officers in the Engineer Corps of the United States Army; names that embrace every officer who had had experience in this kind of work on the Atlantic seaboard, and who was within reach and who could be called upon to testify. And I will show you in a minute what they have said.

But in addition to these army officers came G. Y. Wisner, Director of the American Society of Civil Engineers; Lyman E. Cooley, G. W. Brown, R. S. Burnett, J. W. Rutherford, J. W. Daniels, W. F. McCauley—no; I am through, now, with the civil engineers. Now I come to competitive contractors. When this principal contract over which this controversy has arisen was let, there were fifteen bidders in competition with the men who got the contract. And I will show presently that both courts have found that this contract was absolutely honestly let. There is no question about that at all upon this record. And here are some of the men who bid; here are the men who bid against the men who got the contract:

W. F. McCauley, Jacob Friday, R. Moore, E. L. Friday, S. W. Skinner, A. R. Stewart, R. G. Ross, Thomas E. Wallace, J. L. Grim, J. B. Sanford, I. H. Hathaway, J. A. Bryan.

In other words, there were twenty-one of the most distinguished engineer officers of the United States Army, all of whom may have been included in the statement that "a lot of his personal friends in the Engineer Corps testified for him"—men of the highest character; men of such high

character that the Circuit Court took occasion to say that they were men of the highest character.

I want the exact statement that Court made. Speaking of these witnesses, the trial Court says:

> "The foregoing witnesses were either government engineers, or prominent civil engineers or contractors in competition with Greene & Gaynor, all of them men of standing and eminent in their line. As might be expected, they are not all advised in detail as to the work in question. They were, however, posted generally in regard to the construction and methods complained of, and are entitled to great consideration."

Now, listen:

> "It is an impressive fact in this case, that the defendant is so emphatically endorsed by these men who are above suspicion."

I will not stop now to call attention to other remarks made by the solicitor in his brief. I have called attention, in the first place, to what he said about these former adjudications, in order that the Court may be advised at the outset that this is an open question which we are going to present. There is no adjudication anywhere that stands in the way of a full, open investigation, and a comprehensive decision upon the subject. Then, in the second place, I call attention to such statements as those I have read and commented upon, found in the brief, so that your Honors may not accept anything you find there, if we have denied it, until you at least look at the record.

Now, with that out of the way, I want to call attention in the next place to the nature of this suit.

It has been stated, perhaps, fully enough; but I want to repeat that it is a suit in equity to recover certain described real estate and certain specifically described personal property, consisting of bonds and stocks, etc. The bill is predi-

cated upon a charge of conspiracy to defraud the Government, entered into by Carter in 1890 or 1891. The bill is not exactly clear on that point, but it charges that they put it into operation on the first of January, 1891; so I assume it was prior to that time. It is predicated on a charge of conspiracy to defraud the Government, with numerous allegations as to the steps that were to be taken, all agreed upon beforehand, in pursuance of the conspiracy, followed with the charge that each of these steps was taken; and then, as a result, it is charged that the Government was defrauded to the amount of something like two millions of dollars. That is followed by a prayer for the recovery of this specific property, and a prayer for general relief.

I have contended in my brief—and, if I have time, I will return to say something more about it—that they are not in any event entitled to a money decree in this case. No money decree is asked for. They ask simply for equitable relief. But, notwithstanding, they have practically rendered judgments in the lower courts. I understood the counsel who preceded me to call them judgments, and I might say they were not only judgments, but executions also, for whereas the Circuit Court had found that this was a suit to recover property which was the proceeds of certain fraudulent profits from those contracts, yet $34,600 at par value of bonds, worth in the market thirty-seven thousand and some odd dollars, turned over by O. M. Carter, were shown not to have come from investments of fraudulent profits, but to have come from his own private funds, and therefore he was allowed to retain that amount of money. He having turned it in, the court directed it to be turned back to him, the Circuit Court of Appeals affirming that finding, so that both courts found that he had turned in this $37,000. The Circuit Court of Appeals affirmed his right to that, but said: "Inasmuch as he has paid out $105,000 for lawyers' fees and on other accounts which he had no right to pay out, we will give a judgment against him for that amount, less

this $37,000." That is the way the decree in the Circuit Court of Appeals was ordered to be entered.

I contend that that was in the nature not only of a money judgment, but also of an execution, and I have cited the authorities on that point in my brief. I do not think it can be necessary to take further time to argue it here, and so I will pass to something else.

The suit, then, is in equity to recover property. It is a principle of equity, so familiar that I must apologize for stating it, that the allegations of the bill and the proof must correspond. The first assignment of error is that there is an absolute failure of proof, and the second is that there is a fatal variance between the proof, in so far as it tends to show fraud, and the allegations of the bill. I have already pointed out in a single sentence the nature of the action—that it is based on a conspiracy. Now, they go on to allege that this conspiracy, entered into between these contractors whom they name, was a conspiracy that amounted to a prearrangement and an agreement beforehand that Captain Carter, as the engineer officer in charge of the work, should so draw the specifications as to make them uncertain and misleading, and that he would interpret them only to his co-conspirators, so that they alone would know how to understand them, and, in the second place, he would advertise these contracts for a less period than he ought to have advertised them for under the requirements of the law and fair dealing, and that in the receiving of bids he would favor his co-conspirators, and that in the award of the contracts he would favor them, and that if there were any contracts secured by others than the conspirators he would so harry and annoy and bedevil them with restrictions and requirements of one kind and another as to break them up and drive them out of the business, and that he would, by a lax supervision, favor these contractors in all the contracts that they got. And then there is a further charge that this conspiracy was to the effect that he would allow them to furnish inferior materials, and that he would allow them

and recommend for approval by the Department at Washington extravagant and exorbitant prices. I have set it all out at very great detail in my brief.

The testimony shows this—and I can recite what is shown better by referring to my brief. But before I do that let me say that the findings of the two courts below were in favor of Carter on all these points, as I will show presently. But this bill, which was broad enough in its terms to apply to every kind of material, is shown by the findings to raise no question—that is, the record raises no question and the findings raise no question—except only on the price of brush mattresses. Now, in order that your Honors may understand what I am talking about——

Mr. Justice HOLMES: The price of brush mattresses?

Mr. FORAKER: The price of brush mattresses. In order that your Honors may understand that, I shall have to enter into some explanation.

Captain Carter, as has been said here, was the officer in charge of the Savannah district. For forty years the Government had been undertaking to improve the harbor of Savannah. It is a distance of twenty-four miles from Savannah down to the sea. As your Honors doubtless all know, that is a very low, marshy country; the bottom of the river is a very soft kind of mud, and in high water mud and silt in great quantities come down from above. Then the tide comes rushing in from the other side, and the result is that between Savannah and the sea there is a constant shifting and piling up of sand banks and bars that make navigation there, or always did make it, unsafe until Captain Carter entered upon this work. For forty years the Government had been undertaking to correct that. They had been spending thousands and tens of thousands of dollars every year for forty years to dredge the river to make a channel and to keep the channel open. But no sooner would they get the channel open than this silt and mud coming down would fill

it up again, or the tide rushing in would change it, so they never were able to have any satisfactory channel.

When Captain Carter went there the channel was seventeen feet deep. That is the deepest it ever had been. He was charged with the duty of examining with very great care and reporting some plan, if he could devise one, as to how that could be improved. After a very careful study of the whole matter, and after a very careful study of river and harbor improvements along that coast and elsewhere in the United States, he recommended a plan whereby by a system of jetties and training walls made by the planting of brush mattresses and brush fascines (and I will explain in a moment the difference between a fascine and a mattress), and with stone and with dredging and with piling, he might work an improvement of that harbor that would bring satisfactory results.

He drafted specifications covering his plan. His plan was carefully considered; it was approved and adopted. In due time a contract was let, and the contractors began their work. They were at work on it pretty nearly a year without making much headway. His plan was to sink brush mattresses; and in order that the court may get at once an understanding of what a brush mattress is, in the sense in which the expression is used here, it should be stated that they would go into the woods and cut brush and bind it together in what are called "fascines." About every two feet there would be a cord of tarred rope or wire or something to "choke" it, as the expression is. If it is only desired to use a few of these artificial logs, brush logs, they may be used as fascines, and when they are used as fascines they are generally bought by the cubic yard. But if they want to use them as mattresses they are bound together and bought by the square yard, and they make mattresses as large as fifty feet in width and one hundred feet in length, and even much larger than that.

Mr. Justice HOLMES: A mattress, then, is nothing but a series of fascines bound together?

Mr. FORAKER: Yes; that is it.

I think it will be helpful to the court if, at this point, I turn to the opinion of the Circuit Court of Appeals and read what they say. For this whole case, that has been so full of fine engineering questions, and so full of law questions, and so full of suspicions and charges of fraud, dwindles down to just one single question—brush mattresses; whether or not Captain Carter had a right to buy them by the square yard instead of by the cubic yard, and whether he bought them at a fair price and took no more than he needed. I am prepared to show by all the engineers who have testified, that it was according to precedent and less expensive to purchase by the square yard; and I am prepared to show that he did not pay one cent more than the fair market value. He paid the price that was bid, and nothing but that; and he had no more share in the profits (as I think I can show) than the man in the moon had, notwithstanding all that has been said.

Now I want to read what is said by the Circuit Court of Appeals on this subject. I will commence at page 13410 of my brief, that being a reprint of the Circuit Court of Appeals' opinion. I should say, in the first place, that there is a question here of this kind: He called for bids upon three different kinds of mattresses at the same time. That was seized upon as though evidence that a fraud was to be committed. He called for bids at the same price on three different kinds, with the right reserved to him to use which ever kind he saw fit. It is charged that the favored contractors, the co-conspirators, had an intimation from him as to which kind he would use, etc. But every one of these facts is found to the contrary.

Now let me read:

> "The specifications called for three different styles of mats to be employed in the work in quantities to be fixed by the engineer in charge. Mat No. 1 was

composed of logs laid parallel to each other, fastened together and covered with several inches of brush and then bound together by poles to the required dimensions. No. 2 consisted of artificial logs made of brush bundles (fascines), laid in alignment, tightly bound and choked at regular intervals, placed side by side, as in No. 1. Across these were placed transversely long brush logs, one on each edge and one down the middle, and all bound together by grillage poles. No. 3"——

Now, this is the kind that was used—

"No. 3 consisted of brush logs firmly united by grillage poles as in No. 2, but lacking the transverse brush logs, with double sets of grillage poles, however. In performance of the work this design No. 3 was employed throughout and the complainant contends that this was much cheaper to construct and that by reason of an understanding between the contractors and Carter that No. 3 should be used, the contractors—Greene and Gaynor, operating under the name of The Atlantic Contracting Company—were able to underbid other contractors and so obtained the contracts.

"The opinion reviews the testimony of various witnesses upon the question of difference in cost and concludes that there was 'nothing unusual or improper in Carter's action in treating the case of the three designs as practically the same, when considered with reference to the fact that different kinds of work might require different designs on the same contract;' that 'of itself it discloses no evidence of a conspiracy to defraud, nor does it tend so to do.' The contention of the Government that Carter embarrassed other bidders by this method of including the three designs as of one price is, in effect, stated to be unsupported by evidence."

This is the Circuit Court of Appeals referring to the opinion of the Circuit Court. But as to every one of these findings, as I shall point out presently, this court, according to the interpretation I put upon its language, which I think is fair and was intended, concurs.

Mr. Justice HARLAN: Who was the Circuit Judge?

Mr. FORAKER: Judge Kohlsaat; Judge Seaman in the Circuit Court of Appeals. His name stands at the head of this opinion, and I suppose it was delivered by him.

> "In reference to contentions that Carter discouraged other bidders by refusing to furnish specifications, or sending one copy only when three were required, and other complaints mentioned, the opinion states that several mistakes do appear, but not any 'sinister motive' therein, and that nothing appears in evidence upon the opening and letting of bids 'calculated to cast suspicion upon Carter's conduct.'
>
> "The contract of 1892 for Savannah River work and other subsequent contracts referred to, called for bids for mats by the square yard, and it is contended that prior to these transactions 'mats had always been purchased by the cubic yard'; but it is stated that this is not supported by the evidence and that like terms appear in numerous instances of prior contracts, and that no reason appears why 'this class of work should not have been dealt with by the square yard'; and that fraud can appear only in the price paid or the character of work accepted thereunder.
>
> " 'Substantially all the fascines used in the several improvements under consideration were made up into mats. These fascines are required by the specifications to be made of live brush of cedar, water oak, myrtle, sweet gum, or any other variety of wood approved by the engineer officer in charge. The fascines will be from twelve (12) to one hundred (100) feet in length (contract of 1892, and 30 to 100 feet in contract of 1896) and must be compressed tightly by an approved form of choker to a diameter of nine inches at intervals of two (2) feet, where they must be bound firmly with wire or tarred rope of approved strength. The brush used shall be as straight and well trimmed as can be obtained. The fascines shall be carefully and thoroughly made and handled with care. They shall be piled on shore or on barges for measurement in such way as the engineer officer in charge may direct.'
>
> "The contract of 1892 assumed"——

Now, let me explain there: There were fourteen contracts with respect to which these frauds were charged. The first was let in 1891 and the last two were let on the 8th of October, 1896. The Circuit Court said that it would consider as typical of all only two—the big contract for the improvement of Savannah harbor (the river from Savannah down to the ocean), and another contract, let in 1896, at Cumberland Sound. Now, it says:

> "The contract of 1892"——

That was for the Savannah River——

> "assumed the quantities of different materials to be used as: Square yards of mattresses, three hundred and fifty thousand"——

That is, they estimated, in canvassing for bids, that 350,000 square yards would be used.

> "Cubic yards of fascines, 300,000, sawn timber (feet), 800,000, riprap stone, cubic yards, 200,000. 'Under the power reserved in the contract authorizing the engineer to vary the relative amount of each, Carter increased the amount of mattresses to 1,363,572 square yards, to the practical exclusion of the other materials above enumerated. He was thus able to keep within the estimate of the cost of the whole and within the appropriation, while, at the same time, he accomplished the results sought for.'"

I should say here, with respect to this, that attention is directed to brush mattresses rather than to something else because in this Savannah improvement he found it necessary (as I will point out presently) to increase the use of brush mattresses; and he increased them and used them in multiple mattresses instead of in single mattresses. According to the specifications, if he used them in single mattresses (and the officers all testified that it was within his right as an engineer officer to require the use of the multiple mattress which was ordered), he had to put a layer of stone

on top of each mattress. The result was, as one after another went down with the stone on top of them, that very soft mud yielded, and they sank, some of them as deep as seventy feet, in the mud. He found it impracticable to make headway with single mattresses, each loaded with stone. And so the third design came to be used in multiple mattresses for a number of reasons.

(The court thereupon adjourned until tomorrow, Friday, January 14, 1910, at 12 o'clock m.)

WASHINGTON, D. C.,
FRIDAY, *January* 14, 1910—12 o'clock m.

The court met pursuant to adjournment.

Present: The same parties as heretofore stated.

Argument of J. B. Foraker, Esq.—Continued.

Mr. FORAKER: May it please the court: When we adjourned yesterday I was commenting on the use of multiple mats in connection with this river and harbor improvement; and I had started to read what is found in the opinion of the Circuit Court of Appeals with respect to the nature of that use, and the necessity for it. I desire now to finish that reading:

> "In September, 1893, the contractors began under the 1892 contract to construct what are termed multiple mats or mattresses, for which no provision was made in the contracts, specifically. These 'consist of one mattress imposed upon another, varying from two to as many as sixteen, according to the needs of the construction. They were built upon the deck of a barge, especially prepared for the purpose, with facilities for sliding them from the deck into the positions desired. It is claimed by Carter and seems to be conceded, that this method of planting the brush mats was found to be very desirable in order to prevent the undermining which preceded the laying of single mattresses or stone work. The scouring

produced by the resistance of the single stone-loaded mats to the currents had a tendency to cause the currents to work around the outer end of the single mat and stone work and undermine it. By the use of the multiple mats the construction proceeded so rapidly and so affected the currents as to prevent the bottom wash, whereby a more even foundation and other good results were obtained. In addition, it seems the single mat, when separately loaded with stone for ballast, was apt to sink into the soft bottom of the river, sometimes to the depth of seventy feet. By the use of multiple mats, it was possible to sink eight courses of mattresses with the same amount of stone as is required by the specification in sinking one mattress. Thus seven courses of stone were saved, while at the same time the construction was laid rapidly and made less liable to sink into the muddy and sandy bottom of the river. To build these multiple mattresses without making the openings between the different layers too large, the double grillage was omitted from all the mattresses except the lower side of the lower mattress and the top of the upper mattress. There would be only a half grillage between the intermediate tiers of fascines. The multiple mat was firmly bound together with wire and by other prescribed methods, so that the whole formed a compact body of large dimensions, often one hundred and more feet wide and fifty feet long, weighing sometimes two hundred tons. The barge was then towed out to the place where the mat was to be placed and by means of a lowering adjustment located on the side of the barge next to the destined place, the mat was slid off into the water and into position and weighed with stone sufficient to sink it and hold it in place. Complainant insists that thus a large saving was made to the contractors both in material and labor in that they were saved the trouble of planting each mattress separately, and the cost of the unused grillage poles. The saving in stone accrued to the Government, except so far as it was otherwise expended, more particularly in paying for the extra fascine work. The use of multiple mats on the Savannah River work is warmly approved by most

> of the experts and is fully justified by the evidence. It is also clear that for the purposes of that work it was desirable that the grillages be made single, except at the bottom and on the top of the multiple mattress.' After recapitulation of the conflicting testimony as to the advantages of this plan of multiple mattresses, the opinion states that 'there seems to be little ground for questioning the good judgment and skill of the engineer in charge in causing the mats to be put together and used in the multiple form, nor is it apparent that there was anything suspicious in his not insisting on a reduction in price per square yard for mats laid in multiple form, as against individual mats, provided they came up to the specifications.'"

In other words, if your Honors please, the plan of improvement for that harbor was to canalize the river from Savannah down to the sea by building these brush-mattress training walls wherever necessary in the river in order to control the current. As a result of that, it will be seen that the depth of the channel was deepened from seventeen feet to twenty-six feet; and it was chiefly due to the fact that he used multiple mats in the way I have just read. The single mats would sink so far into the mud that the proposition became practically a prohibitory one. But with the multiple mats, and only one course of stone, the record shows they would sink and remain in position and would accomplish the desired result.

Mr. Justice HOLMES: Excuse me one second. Is the opinion which is printed at the end of your brief the whole opinion?

Mr. FORAKER: At the end of my brief is printed the entire opinion of the Circuit Court, and also that of the Circuit Court of Appeals. And in the opinion of the Circuit Court of Appeals will be found the agreement that was discussed yesterday.

Mr. Justice HOLMES: One thing more. What is a "grillage"? I do not understand that.

Mr. FORAKER: The grillages are the poles that are put on the tops of these mattresses to bind them together. They are a mere binding.

I next desire to call the attention of the court to what was found below as to the price. I want to show, in the first place, that the increased use of brush mattresses was made necessary by what developed as the work progressed; as I was about to say when Mr. Justice Holmes interrupted me that Captain Carter started to use single brush mattresses, he had no purpose, no thought, at the beginning, of using any but single brush mattresses with a layer of stone on top of each. But when he met with the kind of experience I have referred to, it became necessary to experiment, and find, if possible, some other way of accomplishing the general purpose of improving the river. And after months of experiment, he hit upon this plan of using multiple mattresses. And as the court intimates here, it was claimed by the Government that that was a cheaper way of putting in the mattresses, and that there ought to have been (as the court says, as I will call attention to presently) some modification of the price after that was resorted to. But the testimony of such engineers as General Bixby is to the effect that to use the brush mattresses in these multiple mattresses was quite as expensive as to use them singly; and there was no increased cost to the Government.

The court below finds that by the use of multiple mattresses they were able (having only one layer of stone instead of eight) to dispense with the use of over $700,000 worth of stone, on which the profits of the contractors would have been (as the Circuit Court found) at least $275,000. That was testified to by the Government's own witnesses.

So that this increased use of brush mattresses became necessary because Captain Carter found it necessary to employ multiple mattresses; and to this very great extent he dispensed with stone, and thus equalized the cost. His plan was estimated to cost about three and a half millions of dollars. The

Government appropriated that amount. The entire work was constructed within the estimate, and within the appropriations, and something less. And the Circuit Court finds, upon the testimony of such witnesses as I read the names of yesterday, that it was a triumph of engineering skill; there was never anything accomplished by any engineer of the United States Army in that kind of work that exceeds it; the very highest compliment was paid to it. And the work that he thus put in the Savannah River is there today, as good as it was when he left it.

I call attention to that particularly because in the brief of Mr. Erwin I found, looking it over again last evening, that he states, at page 187, that it has been necessary (or words to that effect) to expend on this work since it was completed $847,658.94. That statement is of the character of others to which I referred yesterday. The testimony will show, the record shows (and there is no conflict on the point at all), that this was an expenditure made by the Government subsequently not to better this work, but to deepen the channel two additional feet by adding to the work that Captain Carter had done. It was not an expenditure to put his work in repair, for that is in good repair still. There is some expenditure on account of it each year, but it is trifling in amount. The testimony of Colonel Quinn, who succeeded Captain Gillette, is given in this reference to the testimony at page 37. He was asked:

> "How do the training walls, jetties, and other harbor works in Savannah harbor last, apparently?
> "A. They are still standing in apparent good order, the most of it that I have looked at.
> "Q. I merely inquire as to the present condition?
> "A. Seem to be in fairly good order as far as my observation goes; they didn't require much repair, that is, with two or three exceptions; I made some repairs to the upper work.
> "Q. To any considerable amount?

> "A. Not very extensive; we put in about 12,000 cubic yards of rock to bring up some stone jetty that was submerged."

And that was all. The work stands there today in good repair.

I have now shown your Honors that it was necessary for him to make use of multiple mats, and that it was necessary for him to largely increase the amount of brush mattresses. The amount of brush mattresses estimated in the canvassing for bids was 350,000 square yards. He used 1,362,000 and some odd square yards. He used them because he found it necessary to resort to multiple mats and to use them in the way indicated. The result was one of entire satisfaction.

Now as to the price:

> "The bid of Greene and Gaynor for mattresses per square yard"—

The Circuit Court of Appeals say, at the bottom of page 13412—

> "Was ninety-five (95) cents and for fascines per cubic yard one dollar and sixty ($1.60) cents, and the Government contends that the fascines should have been procured and measured by the cubic yard, and when required made into mats without additional cost, as shown in prior contracts, where it appears, however, 'that the amount of mattresses required was nominal.' It appears from the evidence that while small quantities of brush fascines can be readily obtained in most localities, 'large quantities are hard to get.'"

I might say, in illustration of that, that when he resorted to multiple mattresses it became necessary, as the testimony shows, to go as far as ninety-five miles away from Savannah in order to get a sufficient quantity of brush. And there, at that distance from the work, the mattresses in multiple were constructed on the barges, and were brought by water all

that distance to Savannah to be used. They had to go there, because when they wanted a large amount it was difficult to get it.

I have read as much as I need to. At that page the court will find a discussion by the court as to the cost, which is that the loose fascines were bid for at $1.60 per cubic yard, brush fascines. They asked for 300,000 fascines and 350,000 square yards of mattresses. And the court says that $1.60 per cubic yard of loose fascines is conceded to be a fair price. There is no contest over that. Then the court shows that from the testimony it appears that it was cheaper to buy the brush in mattresses by the square yard at ninety-five cents, by twenty-four cents a square yard, than it would have been if he had bought them, as the complainant's solicitor contended he should have done, by the cubic yard, and then bound them into mattresses and used them in that way. So that you will find that the court below found that there was a saving to the Government in buying them by the square yard instead of by the cubic yard.

Now, if your Honors please, I want to call attention to the fact that, commencing at page 38 of my main brief, I have pointed out all the questions that have arisen with reference to these brush mattresses, and the use of them, and the price of the same; and I have indicated there the finding made by the court below. For instance:

First, there was no conspiracy. Remember that this whole case is bottomed on the charge that there was conspiracy entered into before anything was done, and that everything that was done was done in pursuance of the conspiracy. Both courts have found that there was no conspiracy.

Mr. Justice LURTON: Judge Foraker, let me ask you a question with respect to the Government being defrauded through the profits made by the contractors on any particular contract. You have made some very broad and emphatic statements in respect to the insufficiency of the proof to show that the Government was defrauded with respect to any par-

ticular contract from which it is supposed these profits ensued.

Mr. FORAKER: Yes.

Mr. Justice LURTON: I should like to ask you this question: What inference might be reasonably drawn if the court should be satisfied that these contractors paid over to Captain Carter a proportion of their profits?

Mr. FORAKER: I will come to that in a moment, if it will suit your Honor just as well.

Mr. Justice LURTON: Just as you please.

Mr. FORAKER: I am just now proceeding to close that part of my argument by which I have undertaken to show that there has been a finding by two courts in Carter's favor as to every essential fact charged in the bill; first, that there was no conspiracy; and then that this and that and every other step taken are settled in his favor. Your Honors will find all of that in the brief, and I will not stop to go over it at this point. I will now address myself to the question that has just been propounded to me by Mr. Justice Lurton.

Your Honors will find that the court found there was no conspiracy. Both courts found there was nothing irregular about the specifications. Both courts found that the advertisement was sufficient, legal, and proper. Both courts found that the letting was fair, and that no exception whatever could be taken to it, and that the awards were made in every case to the lowest bidders, and that after the contracts had been thus entered into, without any fraud whatever apparent on the face of the transactions, the work was prosecuted with diligence and to a successful termination. I speak of this Savannah harbor contract particularly because it is typical of all the others; and it is the largest of all. In that one contract, perhaps five-sixths of all the money that was paid out was expended. The whole transaction, therefore, down to the letting of the contract, was found in Carter's favor by both courts. And as to the work under the contract, the courts find, both of them, that the prices were fair prices.

The overwhelming weight of testimony supports them in that finding. There is practically no testimony to the fact that any material was contracted for at an extravagant or exorbitant or improper price. This contract price of ninety-five cents per square yard for brush mattresses was the price that commonly obtained in that district; and they had been contracted for by other engineers in neighboring districts along about that same figure.

So that we have a fair price in the contract, and there is no controversy now except as to brush mattresses. We have the contract honestly entered into. The price named in the contract is a fair and legitimate price, the result of bidding, and the lowest bid; every thing regular, and all approved by the Chief of Engineers here at Washington.

Then came the work. That was prosecuted diligently and with exceptional success. And yet there were large profits, and there was a division of these profits, probably, with Mr. Westcott, and, in a way I shall point out directly, Westcott paid a large amount of money to Carter. But no money ever came to Carter directly from the contractors, and no money ever came to Carter from Westcott that he had the slightest suspicion had come from the contractors. But before I come to that I want to say, in answer to the inquiry made of me by Mr. Justice Lurton (if I understand it), that it is my contention in this case that the Government, before it can recover, must not only show the conspiracy it charges and the fraud it alleges, but it must show that the Government in consequence was damaged.

If the contract was fairly entered into, and the prices named in the contract were fair prices to be paid, and every dollar of money was accounted for, there was absolutely no damage to the Government. I have been unable to find any testimony here to justify the claim that the Government has suffered any damage. The Government got exactly what it wanted. It got it at the contract price that it agreed to pay. It got it in accordance with the terms

and conditions of a contract which it had deliberately entered into. And so it would seem to follow that if the Government paid out no money except only in discharge of its obligation under that contract, it parted with all its right to that money when it paid it out.

Yet there was an extravagant profit. But how did it come about? Not because there were excessive prices named in the contract, but because, as this record shows, the contractors employed what is known in this record as peonage labor. They paid their laborers a dollar a week and board (which the Circuit Court says was of the worst), and that was all. They paid them that instead of a dollar and a half a day, the regular contract price for that kind of labor that obtained in that district at that time. That being the case, they made an excessive profit, no doubt, for, in the first place, they would be entitled, on a hazardous work like that, I suppose, to anywhere from twenty-five per cent up to forty per cent. That is not stated in the record, but I have here a standard work on the subject (so it is common knowledge), which says that on work of this kind the profit generally computed to be allowed to contractors is anywhere from twenty-five to forty-five per cent. But suppose it is twenty-five per cent, they would certainly be allowed that much of a profit, and the Government's witnesses testify that the contractors would have made a profit of $275,000 or something more than $700,000 of stone that the brush was substituted for.

If the substitution of the brush cost the Government nothing, and if it was necessary to the efficient prosecution of that work to a satisfactory result (as the testimony shows conclusively it was), and if the price paid for it was only the contract price, and that was a fair price, then the Government has no right to claim anything, unless the Government has a right purely and solely because there were excessive profits to pursue and recover them. And that I claim the Government has no right to do,

especially not when they are the result of peonage prices paid to labor. That would be for the Government to step in, after it had gotten its work, after it had secured satisfactory results, and pursue the contractors, and say: "You have employed peonage labor, and you have made a great deal more money than you had any right to make. and therefore we will take it from you." There is no testimony in all this record to justify the finding that there were any excessive profits, except only as they were made in that way.

Mr. Justice LURTON: But there were fiduciary relations, Judge Foraker, existing between the Government and its engineers. If an employé receives back a commission upon part of the price which he is to pay for the employer, is it necessary for the employer to show that he had paid anything more than he ought to have paid? May he not recover from the agent?

Mr. FORAKER: Your Honor supposes that Captain Carter received money knowing that it came from this source.

Mr. Justice LURTON: That is assumed for the purposes of this question.

Mr. FORAKER: I will proceed to show that he did not.

The first proposition is—and it seems to me this case ought to stop right there—that the Government can not recover unless it shows fraud. Everybody will concede that. Is it not equally clear that the Government cannot recover unless it shows damage? And if there was no raid on the Government, but only a raid on a lot of poor, helpless laborers, the Government has no right to come in and claim the fruits of that kind of wrongdoing.

Mr. Justice HOLMES: Justice Lurton has put to you, with reference to that contention, the difficulty that was in my mind: That is to say, leaving on one side for the purposes of the question the contention you are just making, if a person in confidential relations with his principal should knowingly derive a secret profit from that transaction, would it be an

answer, if he was pursued by the principal for that profit, that the contract was perfectly fair as between the principal and the other party?

Mr. FORAKER: No; certainly not. I would not think so. At the same time, I do not see how the Government could recover unless it could show that it had suffered some damage. But I waive that, because it is not necessary for me to rely upon any such contention.

Mr. Justice DAY: Your proposition is that there is no testimony to show that Carter knowingly received it?

Mr. FORAKER: Yes; that is what I am coming to right now—that the money that Carter received he got from Westcott. Carter had no relations whatever, as the testimony conclusively shows, with these contractors, except only such as were legal and proper in connection with the enforcement and the performance of that contract.

Westcott, it turns out, was in all probability a partner. The Circuit Court found that he was a partner. Yesterday Captain Carter was criticised because he had not, in his answer in this case, set up that he was a partner. Until after this suit was brought and testimony was taken, Captain Carter never dreamed that Mr. Westcott was a partner in this matter. He had nothing whatever to do with anything that Mr. Westcott had to do with, in connection with the contract, and knew nothing about. When I make that statement I recognize that I have, possibly, a rather troublesome undertaking on my hands to make clear to the court; but I have confidence that I can.

I want first to call your attention to Mr. Westcott, and what the court said about him. It was said yesterday that he was a man seventy-six years old at this time, and that that was an indication that he would not become a partner; that he had retired from business.

Mr. Justice HARLAN: What was his business?

Mr. FORAKER: He seems to have been a confidential man for Mr. Vanderbilt, in the New York Central Railroad, for

a great many years before this transaction. He founded the Westcott Express Company, which was a very successful enterprise. It was said yesterday that he was seventy-six years old at this time. Instead of that, he was sixty-two years old, according to what the record shows. It was also said that when he died his estate amounted to only $450,000, I believe. That was the statement made by counsel for the Government—$450,000. Counsel should have added that the testimony of his attorney, Mr. Hamilton, shows that he gave away before his death several hundred thousand dollars to his wife, and gave large sums of money to his son, and turned over to his son this Westcott Express Company. So that there is no question but what, from the testimony, he was, as the Circuit Court here found, a very wealthy man.

At page 153 of my main brief the Circuit Court says:

> "It is shown that Westcott was a very wealthy man, and a very active business man prior to his retirement some time prior to 1897."

He had not retired until after this.

> "That he had given one of his daughters $70,000, and that Mrs. Carter was a favorite with him."

Now I come to these financial transactions:

Captain Carter married the daughter of Mr. Westcott in the latter part of 1890. In 1891 Mr. Westcott advanced to Mrs. Carter, as Carter testifies (and I will call attention to the testimony which supports that, I think, conclusively), $50,000. Then, in December, 1892, Mrs. Carter died. He had given her, at the time of her death, $50,000. But, as the Circuit Court there said, he had another married daughter, Mrs. Conquest, to whom he had given $70,000. So, under all the circumstances, I submit that there was nothing to be defended in that transaction.

I want to call attention to these financial transactions to show this: That Westcott was either acting for Carter, as the

Government charged that he was, or he was a partner, as the Circuit Court found that he was. Carter says he had no knowledge whatever of the fact that his father-in-law was interested in any way in this contract until after all this trouble came, and certain things became public. If he was a partner, he had a right to be a partner. He had a right to be a partner either openly or secretly. It would not change the legal aspects of any of these transactions if he was shown to be the one or the other. It would necessitate more care, perhaps, on the part of Captain Carter, if his father-in-law was a partner or interested in any way, in showing that he nevertheless scrupulously and conscientiously did his duty as the engineer officer in charge. But if he proved that fact, as he has done here (for the work is shown to be everything that it was stipulated to be), he would be protected as much with his father-in-law interested as a partner as if somebody else had been.

It needs no argument to show that he had to be one or the other. The Circuit Court found he was a partner. The Circuit Court of Appeals said they did not find it necessary to pass on that question. If they had passed on it, I have no doubt they would have found as the Circuit Court did; because the testimony shows conclusively, to my mind, that Carter had no knowledge whatever that Westcott was interested, and therefore could not have been acting for him.

The first thing I call attention to is a diary entry found at page 9031 of the record. I should say, before commencing to read this, that Captain Carter kept a diary in which every dollar of money was carefully noted at the time when he received it—every dollar that came to him from Westcott, and the cause for which it was paid to him. And Messrs. Nelson and McPherson, two expert accountants who testified in this case, after a careful examination of the accounts of the Government's accountant and all the books and checks and papers of every kind and all the bank accounts, testified that Carter's diary and memoranda were absolutely accurate

all the way through, and that the entire record sustained them.

This entry is for Saturday, October 24, 1891:

> "Ther. Cool. Saturday, 24. Wea. Fair.
> "At Orange. Said goodbye to family. Ordered 5 P. C. & I. bonds. Left midnight for Atlanta with Marguerite because no stateroom elsewhere. Took 50 M which W gave to M., 45 her trunk, and 5 to Sav."

That was made, if your Honors please, in 1891, at the very beginning of his relations with Westcott, and the subsequent testimony and diary entries show that after Mrs. Carter died, Captain Carter turned all this money back to Mr. Westcott in so far as he could turn it back. It was all locked up already in Mr. Westcott's vault, perhaps, or safety-deposit box, I believe. At any rate, Westcott took possession of it, and then, from time to time, paid it all over to Carter, the last payment being made on the 2d day of May, 1893, in the shape of a check for $489 and some cents, which the expert accountants work out and say is the exact amount of $50,000 that should have come to him from his wife's estate. That is the first money which he had in addition to his salary.

At page 154 of my main brief, commencing at that place, I take up the financial transactions year by year, and they are of such a character as to show, I think, conclusively that all his entries are genuine, and that he had no control over and no interest in any money that Mr. Westcott received from these people.

In 1891 he got that $50,000 paid to his wife.

Mr. Justice McKenna: What page of your brief did you refer to, please?

Mr. Foraker: Page 154. Now take 1892. During this year 1892 there was advanced to him, as his diary entries show, $2,500. That was advanced to him on June 8, 1892, to enable him to give an entertainment at West Point to some naval officers who were to be there. Subsequently the

ships of the navy were not allowed to go there, and the entertainment was not given, but it was given for that purpose, as the diary entry shows. At this time, bear in mind, there was no controversy whatever over anything.

Then we come to 1893. Yesterday our attention was called to the Government's exhibit "Division 9," as it is called, and it was pointed out with a great deal of confidence as evidence of guilt that Carter had received $565 on a check that was drawn payable to Westcott or Carter—drawn in the alternative—and that that was out of money that had, according to the statement on the other side, come from these contractors.

The fact about that is all set out in the record. Captain Carter himself shows it in his diary. Mr. Westcott was at that time at Richfield Springs. He asked Carter to go to his brokers, saying that he had money on account there, and asked him to have them buy for him certain bonds which are specified in the record. He did so. There was a balance of $565 which they owed to Westcott, and they drew the check to Westcott or to Carter, and Westcott turned it over to Carter and charged him with it in his account and Carter charged himself with it in his account, and that makes up a part (and I want the court to get this clearly in mind) of $6,515 that was paid to Carter during that year, 1893. Then another item is $250, part payment on account of a portrait of Mrs. Carter, and there is another item of $1,250, making $1,500 all told paid on a portrait of Mrs. Carter. The other principal item is $3,400 on account of some towboat stock in a company at Savannah that Mrs. Carter had previously bought. That is the total advancement, or payment, or gift, or whatever you may see fit to call it, made by Westcott to his son-in-law during that year 1893.

Now turn back to page 20 of my brief, and you will find there a table which is set forth in the bill of complaint as evidencing the amounts that were from time to time distributed to Westcott out of this "division by thirds" that we

heard about yesterday. And it will be found by reference to that that up to December 4, 1893, for that year, ending at that date when the last payment was made, Westcott received in this way $205,418.15. Does it need any argument to show that if Westcott was receiving two hundred and five thousand and odd dollars for Carter, as Carter's representative, and necessarily with Carter's full knowledge if he was his representative, he would not dole out to him, in payment on his wife's portrait, $1,500 and in the way I have indicated, a total of $6,515?

It seems to me that the mere statement of these figures is enough. So you will find, if you look at the next year, that he paid Carter all told (the diary entries show what the amounts were that made up the aggregate) $10,000; and during that same year Westcott received $253,000 from these people, according to this testimony and the charge of the complainant.

And so we go all the way through—I do not want to be too tedious about it—until we come to what seems to me to be an absolutely conclusive demonstration that Carter could not have been interested with Westcott, and that he could not have had any knowledge that Westcott was getting this money.

At the beginning of 1895 Westcott concluded that he would go abroad. He had a daughter, this same Mrs. Conquest, who had gone abroad and had become ill. She had pulmonary trouble, I believe. He went abroad, taking Mrs. Westcott with him, intending to remain there and take care of his daughter. He left expecting to be gone a year or two years, or whatever indefinite time it might be necessary for him to remain abroad on account of his daughter. In view of his advancing years, and the uncertainty of life anyhow, he concluded, after talking it all over with Carter and his wife, that they would give to Carter a Christmas gift, as they called it, of a piece of property that Westcott had bought and paid for with his own money. He says so in his

testimony, if I can refer to that; and nobody claims that it was bought with any other money than his own, derived from other sources. That property was known as the Eighth Avenue property. He had paid thirty-nine thousand and some odd dollars for it. They made a deed to Carter and delivered it to him in the January following, immediately after the holidays; and shortly after that Westcott went abroad. But before going he gave Carter a power of attorney to act for him, turning over to him the entire management and control of his property, to invest and reinvest whatever property he might find it necessary to invest or reinvest, and to manage his real estate, and to make conveyances—an absolute, unqualified power of attorney, the very highest possible evidence of his entire confidence in his integrity as a man; something Mr. Westcott certainly would not have done if he had had any knowledge that he was a crook such as it has been charged that he was. He gave him that piece of property, the Eighth Avenue property.

Time passed. Mr. Westcott was gone about sixteen months. During that period this work at Savannah harbor was finished. It was finished practically in July of that year, 1895, three or four months after Westcott left and nearly a year before Westcott returned. It was said here yesterday that there were divisions by thirds going on during that time. There is no proof whatever of any division by thirds during that period. Captain Carter never received a dollar from anybody, except from Westcott's estate which he was handling during all that period, and neither did Westcott during that period.

1897 came; and Mr. Carter, after he had completed this work, was called to Washington by President McKinley. He was voluntarily tendered by him the position of military attaché at the Court of St. James. He asked to be relieved so that he might accept that position. Later President McKinley also appointed him a member of the Nicaragua Canal Commission. He asked to be relieved on account of this

different service which he wanted to enter upon. Before going, however, he desired to make an investment. Mr. Westcott had a piece of property in Orange, New Jersey, that he thought was very valuable and very promising. He offered to sell to Carter a one-half interest in it for $63,000; and Carter bought it and paid him $63,000, using what had come to him from his wife's estate, and all these other sums that had come in the meanwhile, to which I have been referring; and he paid him to the last dollar, using practically every dollar he had. At that time, if Westcott had been acting as Carter's agent, he would have had in his own hands, according to this record, more than $500,000 of Carter's money. It seems to me it is absolutely ridiculous to claim that Carter would pay, out of money that he had in his own possession, that had come to him from his wife and in the ways shown, the sum of $63,000 for that piece of property, if he knew that Westcott had $500,000 of his money in his hands at that time; and if Westcott had been acting for Carter, Carter must have known it. The mere fact that Carter paid for that property indicates that he did not know any such thing, just as he says.

Carter had scarcely gotten away from Savannah before his successor, Captain Gillette, commenced to make trouble; and it got into the newspapers that a great crookedness had been practiced at Savannah. And if your honors could look back in the record and see the kind of charges that were made at that time, you would see that they were to the effect that there had been an extravagant amount of brush mattresses used, and that it was cheaper than the single mattresses to use them in multiple, and that there were enormous profits made, all shared with Carter; and charges were made to the War Department of that character. As a result of it, there was a board of inquiry ordered. Carter knew nothing about this until he arrived in New York on his way home. He had gone over to London and made some arrangements about continuing there, and then came home to

close up some matters. He learned of the charges when he returned. Immediately he found himself involved in all this litigation that has since arisen. First, there was the board of inquiry in session, convened in a very short time after he arrived. He needed the assistance of counsel, and saw that he was going to be subjected to other expenses, and he did not have any money with which to hire a lawyer and pay him a retainer; he then went to his father-in-law and said to him: "I bought from you the Orange property. I paid you $63,000 for it. Now this trouble has come upon me; I must have a lawyer; and I should like to sell that property back to you for $63,000. I need the money." And Westcott agreed to buy it back. Does anybody imagine that if Carter had known that Westcott had $500,000 of his money in his hands, he would have gone to him with any such request as that? He would simply have demanded such help as he needed and Westcott would not have dared to refuse. Westcott agreed to buy it back; but, now, see the man: He said, "I will buy it back; but if I buy it back, I want you to give back to me the Eighth Avenue property that I gave you two years ago." And Carter, in his extremity, said: "Very well; I will do it," and did it.

Does anybody imagine that Westcott would have asked a return of that property if he had regarded it as otherwise than a gift? And does anybody imagine that Carter would have complied, and would have conveyed back to him $39,000 worth of property (that was the value of the Eighth Avenue property) without any additional consideration except the $63,000 that Westcott was paying him back for the Orange property, that he had paid Westcott?

Transactions of that kind, it seems to me, speak louder than the language of any witness can speak. And this record is full of such transactions. Let me see if I have time for any other.

The point I want to make about all this is that these transactions are utterly inconsistent with the idea that West-

cott was acting for Carter, but entirely consistent with the idea that Westcott was acting for himself, because he deals with this property as his own. It was said here yesterday that all these bonds that Westcott got found their way to Carter's possession, and that the coupons went immediately to Carter's possession. If your Honors please, while I do not want to say there is no truth in that statement, there is no truth in the statement in the sense in which it is made. After these first bonds were purchased, Carter, at Westcott's direction, did collect some coupons. But the diary shows, and the account between them shows, that Carter charged himself with every one of them, and that he paid back to Westcott, after advancing certain moneys that he paid out for his benefit, the sum of $200, which settled the account exactly between them. So they were treated all the way through as Westcott's coupons and not as Carter's coupons. Carter never got any coupons except those until, in 1896, when he was paid by Westcott some of these coupons. But they were all paid to him as Westcott's, and he was charged with them, and took them without imagining that there was any objection to his taking them or any impropriety in taking them. At that time he had no idea whatever that Mr. Westcott was interested in these contracts.

Next we come to what is, I think, still more conclusive evidence that Carter wes perfectly innocent about the matter. In October, 1897, after Carter got back from London and after these transactions with Westcott, the court of inquiry was in session in New York, and the newspapers were filled every day with sensational accounts of the investigation. Carter was on trial; he was being charged with this and that and the other thing, with defrauding the Government, and with getting a share of large profits that had been realized on these contracts. Mr. Westcott, under these circumstances, after having complied with his request about the real estate, came to Carter and said to him, repeating what he had repeatedly said to him before (I should have stated earlier

that shortly after Mrs. Carter's death Westcott said to Carter that he wanted him to remain single and live with him, and help take care of him through his life, and he would give to him his deceased wife's share of his estate, and he would advance it to him in time. That would amount to some five or six hundred thousand dollars).

Mr. Justice LURTON: How is that proven, Judge Foraker?

Mr. FORAKER: It is proven by Carter, and it is not contradicted by anybody at all. It is not proven, so far as I know, by anybody else. It is one of those things that perhaps nobody else would know about. At any rate, that is proven in the case in that way, and the circumstances are such as to make reasonable the idea and to make reasonable the expectation that Captain Carter had in consequence of it.

So, when these troubles arose, Westcott said to Carter: "I have made up my mind that I am going to Europe, and before I go I should like to advance to you your wife's share of my estate, whatever it may be," and he asked him to employ a lawyer to help him, and to have his lawyer meet Mr. Stimson, whom he had employed in regard to the matter, in his law office and let them fix up the necessary papers and transfer it, so that if there was any trouble in the family over such an advancement it might be known to the attorneys and be taken care of by them.

They met there as Mr. Westcott requested, and there Mr. Westcott brought and delivered to Carter, in the presence of Mr. Stimson, Mr. Rose (who was Carter's attorney), and others, perhaps, a long list of securities, amounting to $288,000, stocks and bonds. Carter receipted for them. Whatever else may have been said about Captain Carter, nobody has ever said that he lacked common sense. Can anybody imagine that with a court of inquiry sitting only two or three squares away, and the papers full every day of sensational charges of fraud and corruption on his part, he would accept from his father-in-law or anybody else a large sum of money, give a written receipt for it, if he had the

slightest idea that it had come from that source? It seems to me the mere statement of it should be enough.

So that my contention is (for there is another point I want to talk about for a moment before my time expires) that, in the first place, the Government suffered no damage. In the second place, there were excessive profits, but on account of peonage labor, over which Captain Carter had no control whatever. And I mention that because the Circuit Court of Appeals said that when he discovered that there were large profits being made he ought to have required the contractors to modify the terms of the contract and take a less price. I submit that Carter, as the engineer officer in charge, had no power to require the contractors to modify their contract or the terms of their contract, and particularly not when Carter is not shown to have had knowledge of the fact. There is not a word of testimony to show that he had any knowledge that peonage prices were being paid to labor, or that any excessive or unusual profits were being realized. If, therefore, the Government has not suffered damage, in the absence of knowledge on Carter's part that Westcott was a partner, and in the absence of knowledge on his part that money was paid to Carter that Westcott had received from these contracts, and without proof of his knowledge of any matters of that kind having transpired, there is no ground of recovery.

Now, as to Westcott's relation. If he was a partner, that, it seems to me, is again the end of the whole matter. The court below found that he was a partner, and I do not understand how anybody can find that he was not a partner in view of the way he handled the property and dealt with it, absolutely ignoring Carter with respect to it throughout.

Mr. Justice HARLAN: Had Westcott been engaged in any business like this before?

Mr. FORAKER: Yes, sir; he had been, as I understand, a contractor in some other matters.

Mr. ERWIN: There is no evidence in the record of it, your Honor, if he was.

Mr. FORAKER: I think there is some evidence. The Circuit Court found that he was, if your Honors please; and I remember it distinctly. I did not think of being asked about that. I think he testified that he was consulted by them in respect to some railroad contracts.

Mr. Justice LURTON: You say Mr. Westcott testified? Is Mr. Westcott's testimony in the record?

Mr. FORAKER: Mr. Westcott's testimony is not in the record at all; but yesterday it was commented on——

Mr. Justice DAY: In what year did he die?

Mr. FORAKER: In July, 1901.

Mr. Justice DAY: Before these proceedings were begun?

Mr. FORAKER: Before these suits were brought.

Mr. Justice DAY: You had no testimony from him, stipulated in or otherwise?

Mr. FORAKER: No; nothing at all.

Mr. ERWIN: I should like to state that it is in the record, and it is offered there for the purpose of notice, as I stated yesterday, and is there for that purpose.

Mr. Justice LURTON: What was the date of the court martial proceeding?

Mr. FORAKER: That was in 1898.

Mr. Justice LURTON: Mr. Westcott was dead, then, when the court martial occurred?

Mr. FORAKER: No; he was alive. But courts-martial had at that time no power to subpœna civilian witnesses, or to enforce the production of books and papers.

Mr. Justice LURTON: He did not testify there, then?

Mr. FORAKER: He did not testify there.

Mr. Justice DAY: What do you mean, Mr. Attorney General, by saying that his testimony is offered in the record? Where was that testimony given?

Mr. ERWIN: It was taken on the removal proceedings before Commissioner Shields in New York, to remove the con-

tractors, Greene and Gaynor, to Georgia for trial. At that trial the uncle and brothers had notice of Westcott's testimony denying that he gave these gifts. The brother and the uncle are claiming salaries on these very funds that Westcott testified about. I will just stop there by saying that we offered that testimony to show notice to the brother and uncle, that they knew that Carter's claim that Westcott had given these things to him was controverted by the Government.

Mr. Justice DAY: That was accepted by the court below, was it?

Mr. ERWIN: The court admitted it for the purpose of notice only; not to prove the substantive fact.

Mr. Justice MCKENNA: Mr. Foraker, you say that the court-martial could not enforce the attendance of witnesses?

Mr. FORAKER: Civilian witnesses.

Mr. Justice MCKENNA: Would not the testimony of civilian witnesses have been received on the part of Captain Carter if offered?

Mr. FORAKER: Yes; I suppose so. The testimony shows that he tried to prevail on Mr. Westcott to testify, but Mr. Westcott would not go and testify. He could not compel Mr. Westcott to go. Mr. Westcott gave as the reason that he did not want to be subjected to an examination in which he might be compelled to disclose private transactions that he had had, he said, with the Vanderbilts.

Mr. Justice HARLAN: You say there was a law then that a court martial could not compel civilians to appear and testify?

Mr. FORAKER: It could not compel a civilian to appear at that time, and could not compel the production of books and papers. If your Honors will do me the honor to read my main brief, you will find that I have gone fully into that matter.

The Circuit Court found, with reference to Westcott (I do not want to read all of it), that he was—

"A retired contractor of considerable wealth, now deceased, who was, in his lifetime, familiar with large transactions, from which Carter claims to have received the properties in suit."

I simply read that in answer to the statement of the solicitor for the Government that there is no testimony in the record to show that he was a contractor.

Mr. ERWIN: I still say that.

Mr. FORAKER: Well, that may be. The Court found it, however. And I submit that I may be pardoned for relying upon the findings of the Court that there was some testimony somewhere on which it was based.

I have not time, in the very few minutes left me, to take up for review the accounts filed in this case by the Government accountant, Mr. Edward I. Johnson; but I have dealt fully and in detail with those accounts in my brief. I have shown there that as to numerous items they are absolutely unreliable. The Circuit Court found that although there was much in these accounts that was true, yet there were numerous instances of "forced balances and strained conclusions." That is the exact language of the Circuit Court.

Mr. Justice HOLMES: What accounts are those you are now speaking of?

Mr. FORAKER: The Government's accountant, Mr. Edard I. Johnson, examined these banks, and he made up all these statements.

Mr. Justice HOLMES: They are submitted as the result of his labors?

Mr. FORAKER: Yes. I want to say right there that there is no proof in this case as to what the profits were, except only as it is deduced from coincidences in bank accounts, as was explained yesterday. He examined the bank account of Greene & Gaynor, and he found that certain amounts were paid out; and then he found that about that time, the same day or perhaps days or weeks later, there was something approximating it in amount in Westcott's account or

in his brokers' account, or some other place; and putting the two together, he makes out this theory that there was a division by thirds, and that the profits were large, and that ultimately all this property that they are now seeking to recover came from that source.

As showing the treacherous character of that testimony, let me invite the court's attention to the first item that it is charged in the bill Carter got corruptly—$16,000 from the contracts of 1891. I have dealt with this fully in my brief. I will read what the Circuit Court said about it:

> "At these particular dates"—

The dates when this $16,000 was paid—

> "Greene & Gaynor had no Government contracts on hand, and there is no reasonable theory upon which these payments can be held to have grown out of the contracts in question. They and one Hegeman were then partners in the construction of a railroad. Nothing appears in the record save the coincidences of the amounts and dates aforesaid upon which to make a finding against defendant as to these items. *The coincidences are somewhat remarkable although not exact in but one instance.* They are suspicious but neither in or of themselves nor in the light of subsequent transactions between the parties can it be said that they in any way affect the Government. Therefore complainant's prayer as to them is denied both in regard to the sources from which they were procured and as to the title to the securities in which they have been invested."

And one after another of the items charged is disposed of in the same way in the brief, if your Honors will take the trouble to read it, showing that the statement which he makes, upon which this suit is predicated, is misleading and in many respects absolutely false—so false that it could not have been made except maliciously and purposely, in my

judgment. That is pretty plain language, but this is a pretty plain case.

Now I want to comment on the grounds upon which this decree against Carter was put below. The Circuit Court, you will find (as I said yesterday), found all these facts in favor of Carter—that he had done only lawful acts—and then proceeds to deduce or infer from lawful acts unlawful intent and purpose and action. There is no proposition more elementary than that that is not permissible. But, after finding everything in his favor—that he had not done this, nor that, nor the other thing with which he was charged—the Circuit Court in effect said, "After all, there were these great profits, and they indicated a raid on the Government; and there was this distribution to Westcott." Westcott, however, was a partner, and there was no testimony to show that Carter had any knowledge of that fact.

Mr. Justice WHITE: Did the Circuit Court find that?

Mr. FORAKER: The Circuit Court found that in so many words, but said: "As a conclusion of law, in view of the position he occupied, he must be held to have had knowledge of what was going on." And then the Circuit Court of Appeals, coming to review the matter, agrees with the Circuit Court as to every one of its findings; not a single one does it dissent from. But, after having so agreed, it says: "But all these must be taken into consideration in connection with the general chain of circumstances," and it then proceeds to point out suspicious facts. They approved the multiple mattress, they approved the price, they approved everything just as the Circuit Court did, and then they found that he must have had actual knowledge of what was going on, because, when the 350,000 square yards of brush mattresses had been used that were estimated for, he ought to have learned by that time that these exorbitant profits were being made, and it became his duty at that time to require the contractors, before he made further extended use (using the word "extended") of brush mattresses, to modify the

terms of the contract. I cannot quote the exact language, but that is the effect of it—that it was his duty to modify the terms of the contract. And because he did not make any effort to require them to modify the terms of the contract they say that is an evidence that he was a participator in the fraud. On this point I have already shown that the Circuit Court held exactly the opposite. Then they say another evidence of that was the fact that he let, thereafter, four other contracts at substantially the same prices.

I have pointed out in very great detail in my brief what those four contracts were. I have shown that one of them was let at fifty-seven cents because of a peculiar situation that existed with respect to the bidding, and that under that he had estimated for 50,000 square yards, and he required them at the price of fifty-seven cents to use 213,000 square yards. Another was let at ninety-five cents, I believe it was, or ninety-seven cents, and under that he used only 13,000 yards. And then the other two contracts are the two that he abandoned the superintendence of when he was appointed to be a military attaché at the Court of St. James, and came away after making the first payment, out of which both courts held that he did not get a dollar, although the court-martial had convicted him of embezzlement of a part of that money.

That is the case. I want now (I have two or three minutes, as I understand it) to call the attention of the court to something that I have printed at the end of my brief from Mr. Justice Grier's charge to the jury in Turner *vs.* Hand (3 Wall., Jr., 82), on the subject of fraud. I want simply to read it:

> "You must remember that the burden of proof is on the party who alleges fraud. That fraud, though proved by circumstances, can never be presumed, for fraud is a crime. It is not enough to show suspicious circumstances. Suspicion is not proof. It does not require a great deal of ingenuity to cast suspicion of

fraud upon any transaction. There is a very great and sometimes grievous error into which not only the public mind, but that of jurors and judges too are apt to fall; and which leads to false judgments, and sometimes to great oppression. I would, therefore, specially call the attention of the jury to it, and caution them to beware of it. It is this: The law abhors fraud. Every honest mind hates it, and even those who practice it themselves will join in the denunciation of it. It makes them feel virtuous for the time, and they are the most ready, from the arguments of conscience, from judging of others by themselves, to believe it true, and inveigh most loudly against it. When the clamor of fraud is raised in a community, or when it is confidently charged by counsel in a court, we are prone to see all facts through a false medium, which magnifies the importance of every fact upon which suspicion of fraud may be raised; and ignores the plainest inference against it. In the midst of our virtuous indignation against fraud, we first assume it has been committed, and then seek for arguments to confirm, not our judgments, but our prejudice. 'Trifles light as air,' then become 'strong as proofs of Holy Writ.' Circumstances which to an unprejudiced mind are just as compatible with innocence as guilt, which at best could only raise a suspicion, are set down as conclusive evidence of crime. Those who sit in judgment over men's rights, whether as courts or jurors, should beware of this natural weakness to which we are almost all of us subject. We all fancy ourselves wiser than perhaps others are willing to give us credit for. This feeling is gratified by what we believe to be superior sagacity. Rogues may be cunning, but they can't deceive us. Under this satisfactory belief, we become over-astute, and often see that which is not to be seen. We suffer our imaginations to take the reins from our judgments, and rush headlong in this case after the fox called fraud. Circumstances which should avail for the proof of fraud are such only as are inconsistent with a contrary view of the transaction, and lead irresistibly to that conclusion."

I call the attention of the court to this last sentence particularly, for there is not a particle of proof here of any act done by Captain Carter that is not absolutely consistent with innocence on his part. There is nothing except circumstantial evidence that links him in an unfortunate way with these matters, and that is not sufficient to warrant an affirmance of the decree against him.